SOCIAL PROBLEMS

Published Quarterly by the Society for the Study of Social Problems

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SYMPOSIUM ON LAW AND SOCIAL PROBLEMS

PROBLEMS OF TOMORROW

BOOK REVIEWS

EDITOR'S COMMENT

There currently appears to be a revival of interest in the relationship of law and sociology. It has been furthered formally through the support given by some law schools and foundations which have provided fellowships in law and the behavioral sciences as well as funds for research. The increased interest is also indicated in the Jury Project, sponsored by The University of Chicago's Law School, and, to a more limited degree, by the Bar Associations' Survey of the Legal Profession. The Law School of the University of Pennsylvania has initiated a program which extensively uses the behavioral scientist, and some law schools have appointed sociologists to their staffs; Nebraska and Yale provide examples. Informal support for the study of law by the social scientist was probably stimulated by the Supreme Court's use of social science material in the desegregation decisions. The effects of this stimulus were both direct and indirect, resulting in inquiries into the desegregation decisions themselves, and into other aspects of the sociology of law as well. Examples of scholars pursuing such studies "on their own" may be found in this symposium.

The current issue was prepared in an effort to further encourage these trends by emphasizing the opportunities present in the systematic sociological study of the law. Students of social problems, in particular, have a special stake in this study, if only because of the presumption that the law provides an unequaled means of dealing with social problems in terms of legitimate power and of guiding the processes of social change. (It should be noted that Honigmann, in this journal, challenges the general validity of this view.)

Whatever the potentiality of the law as an instrument of action and local change, it is certainly the case that formal law more and more has become central to modern man's social behavior. Few high government office holders, corporation executives, or others in positions of major authority and responsibility make official moves without the advice of counsel. Over one hundred years ago Tocqueville recognized the importance of the positions held by the lawyers in this country, regarding them as a potential aristocracy. Today, the lawyer, while not properly "aristocracy," is the advisor to, and in frequent instances a member of, the power elite. One finds him, perhaps increasingly, in positions of power in almost all segments of our society.

To emphasize the opportunities present in the pursuit of the sociology of law is not to minimize its difficulties. There are diverse conceptual and methodological problems involved, including those noted below. In addition, the technical and esoteric nature of the law requires specialized training, and law is an ancient profession which in fact has been investigating over many years, although in a different fashion, some of the very materials which the sociologist is now studying. Moreover, lawyers are a disciplined, organized, articulate body of men. Although they do seem more interested — however ambivalently — in sociology, than sociologists are in the law, they may according to Riesman feel threatened by the sociologist, and may also wonder what he can add to what has been discovered by persons already steeped in the law. Lawyers are by training critical and disputatious, and the sociologist who ventures into the sociology of law risks exposing himself to searching, perhaps embarrasing, inquiry.

Our purpose here, however, is not to stress these difficulties as such, but

to note the challenges involved in them. That the social scientist has not yet fully met this challenge is suggested by Geis in his contribution to this journal. That social scientists are willing to meet the challenge is, on the other hand, indicated by their growing interest in the study of the law. The challenge is heightened because it is difficult to arrive at a universally acceptable definition of law. Dean Roscoe Pound notes that various jurists consider under the rubric law three different phenomena: (1) the legal order, i.e., ". . . the regime of adjusting relations and ordering conduct by the systematic application of the force of a politically organized society;" (2) guides to the determination of disputes (an instance of this kind of investigation is provided herein by Evan in his analysis of collective bargaining agreements); and (3) the judicial and administrative processes. The problem is further complicated because many disciplines study the law, using a wide variety of methods, not all of which are approved by and acceptable to the others.

Current research on legal problems concerns itself not only with the law but also with the practitioner. Instances of both of these interests can be found in this issue. For example, Wood, from work which is part of the Survey of the Legal Profession, deals primarily with one kind of practitioner, the criminal lawyer; James' paper, deriving from the Jury Project, discusses juror's interpretation of the law; Gordon focuses on the progressive elaboration of legal doctrine in a case of potentially wide significance; and Lindesmith's article is oriented to the consequences of inconsistencies and contradictions in current narcotic addiction laws.

That law and the lawyer are interrelated within the study of the law is not always recognized. Most sociologists who study the lawyer, his firm or his law school regard themselves and are generally regarded by others as students of the sociology of professions or occupations. The danger of such categories is that the legal practitioner and the law will be examined as if they were insulated from each other. The two are not in fact independent. Jones, in this journal, notes that southern lower court judges possess attitudes favorable to segregation, and that these feelings affect their interpretations of the Supreme Court's adjudication of the desegregation cases. Others have suggested that lawyers circumvent the law by obtaining for their clients favors from minor government bureaucrats. If this is so, then the law is obviously affected by the manner in which the lawyer practices it and if law is viewed as a decision-making process as is implicit in these instances, this alone emphasizes the interrelatedness of the law and the lawyer.

The general area of the sociology of law is of particular interest to the Editors of SOCIAL PROBLEMS, for its study offers an excellent opportunity to develop theory while challenging our basic institutions. At the same time, it provides an area where theory may be tested by its application in the affairs of men.

ERWIN O. SMIGEL

POWER, BARGAINING, AND LAW: A PRELIMINARY ANALYSIS OF LABOR ARBITRATION CASES*

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One of the major social trends in the United States in the past quarter of a century is the growth of the institution of collective bargaining. The violence and turbulence of the conflicts between "labor and capital" of the Haymarket days, of the steel strike after World War I, and of the "little steel" strike of 1937 have been gradually superseded by collective bargaining agreements between "labor and management." These agreements set forth a variety of substantive and procedural rights and duties of both parties. Thus, *power* relations, though not entirely displaced, have been supplemented with *bargaining* relations.

With the replacement of the entrepreneur by the corporate manager, the ideological principle of "open shop" slowly gave way to a reluctant acceptance of some form of union security which offered greater assurance of harmonious industrial relations (2, pp. 267-274). Contributing to this ideological shift was the National Labor Relations Act of 1935 which guaranteed workers the right to collective bargaining. This law produced the *intended* effect of markedly accelerating the growth of trade unionism.**

A key element of the institution of collective bargaining, which according to some students is of singular although unheralded significance for the development of industrial relations, is the grievance procedure (5, pp. 609-610). This provides for the right of both parties to institute complaints or grievances alleging actions in violation of the collective bargaining agreement. For workers, in particular, the right to redress wrongs via the grievance machinery has meant the establishment of "civil rights" in industry which afford workers protection against the exercise of arbitrary authority on the part of management. This has been likened to the application of the constitutional principle of due process (17; 10, p. 1). The grievance machinery constitutes a multi-step procedure for resolving conflicts, with the final step being arbitration. The decision of the arbitrator, a third party whether an individual or a board selected by both parties, is binding.

Although voluntary labor arbitration in the United States dates back to the 1860's, it was not until the 1930's that it became a prominent social mechanism for resolving industrial disputes (34, pp. 1-16, 43). In 1944, 73 per cent of all labor-management agreements contained an arbitration clause in contrast to 83 per cent in 1949, and about 90 per cent in 1957 (20, p. 262; 33, p. 114). The recent spurt in grievance arbitration may be interpreted as evidence of labor union's approximation to management in power and bargaining strength. In fact, it may be hypothesized that a necessary condition for the emergence of *effective* labor arbitration — and this may well be true of international arbitration as well — is an approxi-

*This paper is a product of a general study in the sociology of law supported by a grant from the Russell Sage Foundation. The author wishes to express his gratitude to this foundation for making this study possible. He is also indebted to Harold Horwitz for assistance in the collection of the data.

**For an analysis of unanticipated organizational consequences of law, see (12).

mation to equality in the relative power and bargaining strength of the parties. It is the effect of the relative bargaining strength of the parties on labor arbitration awards which will be preliminarily and illustratively explored in this paper.

Arbitration: A Private Tribunal

The grievance procedure and arbitration of grievances comprise an autonomous system of adjudication (27, pp. 1007 ff.). Instead of resorting to courts to redress wrongs, labor and management have established a private tribunal presided over by a "judge" called an arbitrator whose decisions are enforceable in a court of law. The arbitrator is officially charged with the responsibility for settling disputes in accordance with the "private law"* developed by the parties. This body of private law is contained in the collective bargaining agreement, which, as in the case of any law, requires interpretation. In addition to the provisions in the collective bargaining agreement, arbitrators may take into account decisions of similar cases involving the same or different sets of labor-management parties. Thus, there is a tendency toward the growth of precedent, though not nearly to the same extent as in common-law courts.

This private tribunal has several distinctive features which are noteworthy. Unlike litigation in court, the parties to arbitration must continue to "live with one another" during and after the dispute. In a typical lawsuit each litigant is concerned with a past transaction. Each desires to win the suit regardless of the basis on which the decision is made. But an arbitration award that merely designates one side as the winner and does not achieve the solution which both parties, particularly the loser, find acceptable has not settled the issue. Arbitration is a process by which the parties seek a settlement to a labor dispute which will make it possible for them to continue their necessarily sustained relations with a reasonable degree of harmony.

Another notable feature of arbitration is that both parties choose the judge in a deliberate and self-conscious manner such as does not occur in a "public tribunal." This means that the arbitrator must command the respect and trust of both parties. He must not only be fair-minded but also knowledgeable of the parties' problems and industry. As a consequence, the permanent arbitrator, umpire, or impartial chairman, as distinct from the temporary arbitrator, has become increasingly common.

Since an arbitrator is selected by the parties, and the parties have to maintain an enduring relationship, it is reasonable to expect that the arbitrator would take into account extra-arbitral considerations — just as a judge on occasion takes account of extra-judicial factors— in the process of finding the facts in a controversy and in interpreting the relevant contract provisions. At least one student of labor arbitration has mentioned in passing the possibility that arbitrators consider the bargaining strength of the parties in the process of reaching a decision:

> . . . the degree and direction of pliability of a contract, when its application is arbitrated, may have their roots in a recognized bargaining balance. . . . All that is suggested is that the liberality or narrowness with which a contract is interpreted, even in the face of equivalent language, and the diversity in scope accorded to the arbitration authority are frequently explicable in terms of the collective bargaining balance (13, p. VI).

And an industrial sociologist has asserted that

*For an analysis of the internal law of private organizations and its relation to the law of the state, see (11).

> . . . arbitrators frequently seek to settle disputes on a basis of a balance of power between management and labor. Some arbitrators conceive of their function as just determining what the balance of power is and then getting management and labor to recognize and act on it (23, p. 329).

These assertions may be viewed, until confirmed by research findings, as in the nature of an hypothesis. If we compare three logically possible sets of parties with respect to bargaining strength, this hypothesis leads us to expect that: (a) when the parties are equal in bargaining strength, arbitration awards tend to be equally divided between the parties; (b) when management is superior in bargaining strength, more arbitration awards are made in favor of management than of labor; and (c) when the union is superior in bargaining strength, more arbitration awards are made in favor of the union than of management. In short, this hypothesis asserts that the arbitral process departs from the judicial model of decision-making on the basis of the merits of the case, emphasizing instead the relative bargaining strength of the parties as a determinant of the decision process.

A PROVISIONAL TEST OF THE HYPOTHESIS

The clarity and simplicity of the hypothesis belie the difficulties encountered in testing it. These consist in obtaining a reliable body of data on arbitration awards and in selecting labor-management parties of equal and unequal bargaining strength. This paper will therefore present of necessity only some preliminary and incomplete findings bearing on the hypothesis.

Data on Arbitration Awards. The arbitration award, the dependent variable in the hypothesis, poses no conceptual problems. The award is for one or the other of the two parties, a form of compromise, or a refusal to make an award because the arbitrator wishes to defer the decision or does not think the grievance falls within his jurisdiction. The problem that arbitration awards raise is largely an operational one: How to obtain a reliable sample or a population of awards for sociological analysis? Several collections of awards have been published since 1946.* These are highly selective, containing only those cases assumed to be of general interest to the field and which both parties have agreed to release for publication. The selective bias in these collections of cases virtually destroys their value for research purposes.**

A second source of arbitration awards is the archive of the American Arbitration Association. Since its founding in 1926, the American Arbitration Association has been conducting labor arbitration along with other types of arbitration. However, only recently has an effort been made to process its arbitration records for research purposes. This processing is still in progress and the data have not yet been released to scholars. A third source is the Bureau of Labor Statistics which on occasion reports an analysis of arbitration awards.***

In view of these obstacles it was necessary, for the purpose of this pilot study, to select several sets of labor-management parties which either granted access to their files or provided the necessary data. The selection of the sets of labor-management parties, however, in turn entailed a decision regarding the measurement of relative bargaining strength.

Selection of Parties. As the independent variable in our hypothesis,

*For example (1; 16).

**For example, Shulman (26) presents 221 opinions referring to 383 out of a total of 2,340 cases for the period 1943-1946.

***See, for example (32; 20).

the relative bargaining strength of the parties poses conceptual as well as operational problems. What criterion or criteria shall we use for distinguishing between the bargaining strength of an employer and a trade union? Our tentative answer was in terms of a group property which Merton calls "completeness" (18, pp. 314-315). This property "refers to the ratio of actual members of a group or organization to its potential members, i.e., to those who satisfy the operative criteria for membership" (18, p. 314). This group dimension is clearly applicable to trade unions: what is the degree of unionization in a plant, a firm, or an industry? However, it is not at all apparent how this group property applies to an industrial organization. We have taken the liberty of interpreting this dimension as relating to an industrial organization's "share of the market" (4, pp. 233-236).

The operational problem of finding examples of the three possible sets of parties was solved, after consultation with labor arbitrators, by selecting the Ford Motor Company and the United Automobile Workers of America, on the one hand, and the Affiliated Dress Manufacturers and the International Ladies' Garment Workers' Union, on the other. The former set of parties, it was presumed, represents an approximation to equality in bargaining relations, and the latter an inequality in bargaining relations, with the union being superior. A suitable example of the third logical type, one in which management is superior, was not found because of the dearth of arbitration cases. The arbitration records of General Electric and various electrical unions (IBEW, IUE, and UE) and those of Dan River Mills and Textile Workers Union of America proved unusable because of the small number of arbitration cases. A possible inference from the fact that we did not succeed in locating an example of a relationship in which management is superior in bargaining strength, and one which involves a sufficient number of arbitration cases for statistical analysis, is that under this condition arbitration is very poorly developed. Often the collective agreement in such cases imposes restrictions on the use of the arbitration machinery, such as by confining it to workers who have been employed for at least one year.

With respect to the bargaining position of the first of the two sets of parties selected, the Ford Motor Company — one of the "big three" automobile manufacturers — controls 28.7 per cent of the market for cars and trucks in the United States (19, p. 2883). For an oligopolistic industry this is indeed a high degree of "completeness" and represents a high degree of bargaining strength. Adding materially to the bargaining strength of Ford Motor Company is the virtual alliance of the "big three" manufacturers as regards collective bargaining negotiations. On the other hand, the UAW, a union with approximately a million members and with union-shop agreements, includes in its membership — according to an informant — 97 to 99 per cent of all hourly workers employed at the Ford Motor Company. Thus its degree of "completeness" is likewise very high. It may be argued that this hardly entitles us to *equate* the parties in bargaining strength; perhaps all we can say is that there is an *approximation* to equality in the bargaining strength of the parties.

The first contract between the Ford Motor Company and the UAW was signed in 1941 after several years of a violent power struggle. In 1943, the Office of the Umpire was established, the first umpire appointed being the

late Dean of Yale Law School, Harry Shulman, who served until 1955.

In our second set of parties, the women's garment industry presents an entirely different labor-management situation from that of the automobile industry. Instead of an oligopoly, this industry is highly competitive. In fact, the discontinuance rate is said to be 20 per cent per year (22). The share of the market of any one of the 5,006 dress manufacturers (31, p. 23c-3, Table 1) — and we limit ourselves to this branch of the industry — in the country is so small and precarious and their position vis-a-vis the ILGWU with 450,000 members is so weak, that they have organized themselves into employer associations. Of the five associations which comprise the New York City "dress market," one, the Affiliated Dress Manufacturers, has a membership of 240 employers. In the absence of any statistics on this association's share of the market, we may estimate on the basis of its proportion of the total number of dress manufacturers in the industry that it is roughly 5 per cent. On the other hand, the ILGWU, which has union-shop agreements, includes in its membership about 90 per cent of the potential employees. Even if we consider that this manufacturers' association derives latent bargaining strength from the other four associations, which jointly control approximately 68 per cent of the dress market in the country, we may, nevertheless, conclude that the ILGWU has a higher measure of "completeness" and hence a stronger bargaining position than the Affiliated Dress Manufacturers.

The first contract between the Affiliated Dress Manufacturers and the ILGWU was signed in 1929, five years after the Office of the Impartial Chairman for the New York City dress industry was established. Since 1936 the incumbent of the office of the umpire has been Harry Uviller.*

Selection of Discharge Cases. Grievances referred to arbitration include problems involving job classification, assignment of work, suspension, promotion, transfer, merit increase, payment for vacations, sick leave, insubordination, etc. Some of these may be viewed as trivial or critical by one or the other of the parties. While it is possible that our hypothesis may apply to some classes of grievances and not to others, it seemed that discharge cases, because they are the most serious of grievances, at least from the employees' point of view, were a strategic type on which to test this hypothesis. We would expect that the factor of relative bargaining strength would least affect a grievance where a person's job is at stake, for discharge is the most severe sanction that management can invoke in disciplining its employees. In fact, a student of arbitration refers to it as the functional equivalent in industry of "capital punishment" (28, p. 29; 13, p. 15). Rather than sustain discharges, arbitrators, even when they find the employee guilty of the alleged misconduct, tend to reduce the penalty to suspension or loss of pay. Consequently, they have been criticized by management for substituting their own judgment for that of management and for exceeding their authority (14, pp. 209-213).

The limitations on management rights to discharge range from none at all — which is, of course, the rule in the absence of a bargaining relation — through the requirement for "proper" or "just" cause for discharge to a statement of specific conditions under which management has the right to discharge. The Ford-UAW agreement contains the customary "just" cause

*The data on ILGWU were obtained from an official of this union.

provision: "The company retains the sole right to discipline and discharge employees for cause, provided that in the exercise of this right it will not act wrongfully or unjustly or in violation of the terms of this agreement" (6, p. 17). In the agreement between the Affiliated Dress Manufacturers-ILGWU, the discharge clause reads: "The employer may discharge its workers for the following causes: incompetency, misconduct, insubordination in the performance of his work, breach of reasonable rules to be jointly established, soldiering on the job" (7, p. 46). Ordinarily, it may be assumed that limiting discharge by stating explicitly the causes is a greater restriction on management prerogatives than simply requiring "cause" or "just cause" for discharge. But the rules and procedures in a particular industry governing the interpretation of "just cause" may in fact limit management's scope of action just as much — if not more so — as a written set of requirements for discharge.*

The Findings. The data on discharge cases for the two sets of parties were obtained, respectively, from the Office of the Impartial Chairman of the Dress Makers' Joint Council-ILGWU and the Office of the Umpire of the Ford Motor Company-UAW. The data comprise a population rather than a sample of discharge cases. The time period covered in these cases differs for the two sets of parties. For the Affiliated Dress Manufacturers-ILGWU it extends from 1936 to 1957; for Ford-UAW it runs from 1946 to 1958. This difference in the years covered, however, does not affect the findings, for the results are the same when the ten-year period from 1936-45 is eliminated in the case of the Affiliated Dress Manufacturers-ILGWU.

As shown in Table 1, 76 per cent of the awards were made in favor of the union in the Affiliated Dress Manufacturers-ILGWU cases as compared with 38 per cent in favor of the union in the Ford-UAW cases. Thus the results are only partially consistent with the hypothesis. The ILGWU, which was characterized as having a higher degree of bargaining strength, does have a much higher proportion of the arbitration awards in its favor. But in the case of Ford-UAW, we find a 62-38 distribution in favor of management instead of a closer approximation to the expected 50-50 distribution. Does it follow from these findings that part of the hypothesis is untrue?

TABLE 1

ARBITRATION AWARDS IN DISCHARGE CASES IN TWO SETS OF LABOR-MANAGEMENT RELATIONS

	Per Cent of Awards in Favor of			
	Union	*Management*	*Neither*	*Total Cases*
Affiliated Dress Manufacturers-ILGWU (1936-57)	76	22	2	92
Ford Motor Co.-UAW (1946-58)	38	62	—	1,026

A Preliminary Analysis. Obviously, if we are to avoid converting our hypothesis into a tautology, we cannot draw any inferences from the distribution of arbitration awards about the relative bargaining strength of the parties. The departure from an equal distribution in the Ford-UAW cases suggests that factors other than relative bargaining strength may be operative. Additional support for this

*It is, nevertheless, regrettable that two sets of labor-management parties were not found which have identical discharge clauses in their contracts.

conclusion is provided by a study of arbitration cases conducted by the Bureau of Labor Statistics involving a set of parties, which, in terms of our measure of "completeness," we may rate as roughly equal in bargaining strength, viz., Bethlehem Steel Company and United Steelworkers' Union (32). For the ten-year period of 1942-1952, 89 discipline cases are reported (32, p. 4). Of these cases, a special tabulation by the Bureau of Labor Statistics shows that only 17 involved the discharge penalty; of these cases, in turn, 76 per cent were decided in favor of management, 18 per cent in favor of labor, and 6 per cent for neither party.* This pattern of awards, involving an admittedly small number of cases, shows an even more marked departure from the expected 50-50 split, and, as in the Ford-UAW situation, also points to the operation of factors other than relative bargaining strength.

Among these factors, three will be mentioned which may account for the slightly deviant distribution of the Ford-UAW cases. The first is the possible differential in expertise of the representatives of the parties participating in arbitration proceedings. Particularly in oligopolistic industries, such as automobiles, management may in some instances employ superior staff specialists, if only because they can afford to pay better salaries than the unions in such industries.** Management representatives may, therefore, prove more effective in marshalling the necessary evidence in arbitration proceedings. On the other hand, in competitive industries, such as the women's garment industry, the union may be in a position to employ more competent staff specialists. It is, of course, only a conjecture that this factor applies to the Ford-UAW relationship and that it has affected the pattern of distribution of arbitration awards.

A second factor, which may be more important than the first, is that a union which is especially responsive to its membership, such as the UAW, may press a grievance to arbitration not because it is convinced of the merits of the case but as a means of assuaging the injured feelings of the worker. Hence, it is possible that many of the UAW discharge cases were so weak that the chances of an award in favor of the union were consequently reduced.

A third factor is that the arbitrator's role and role performance may differ in respect to the degree to which they are guided by a "legalistic" approach. In general, a permanent arbitrator whose title is an "umpire" has more restricted powers than an arbitrator known as an "impartial chairman."

> The titles are associated with quite different concepts of arbitration. Umpireships tend to be narrower in outlook than impartial chairmanships. That is, the latter more frequently permit a wider scope of authority for the arbitrator, a lesser emphasis on the language of the contract, and more frequent resort to mediated settlements (3, p. 304).

That the role of the umpire in the Ford-UAW relationship is clearly circumscribed is evident from the provisions in the collective bargaining agreement (6, pp. 44-45). This presumably constrains the umpire to resort to a narrow construction of the contract.

Related to the third factor is the occupational background of the arbitrators in our two sets of labor-management relations. Although both Harry Shulman of the Ford-UAW

*Personal communication from the Bureau of Labor Statistics, April 20, 1959.

**For an analysis of the role of the staff specialist in industrial organizations and in unions, see (21, pp. 304-305, 310-311, 333-335).

and Harry Uviller of the Dress Manufacturers - ILGWU are lawyers by training, the fact that the former was the Dean of Yale Law School and the latter a one-time executive of a trade association might have made a "legalistic" approach to arbitration more congenial to the former than to the latter. An illustration of the possible difference in their approach is the manner in which they respectively handled a discharge case involving an alleged theft. Uviller of Dress Manufacturers-ILGWU reinstated the worker on the grounds that in his judgment the facts did not prove that the worker intended to misappropriate the employer's property (15). Thus the decision was based on an appraisal of the facts of the case and did not involve an explicit interpretation of any clause in the collective agreement. On the other hand, Shulman of Ford-UAW, after a discussion of the criminal-law distinction between petty and grand larceny, admits that the penalty of discharge appears to be too severe in the five cases in question, but then claims that under the terms of the contract he is powerless to modify the penalty. He, therefore, sustains the discharge in three of the cases, apparently mediates one of the cases, and reinstates one of the aggrieved on the ground that he is not guilty of the alleged wrongdoing (30). If, as is generally true of labor arbitration (33, p. 109), the UAW initiates more grievances than does the Ford Motor Company, Shulman's tendency toward a "legalistic" approach may redound to the advantage of management and thereby contribute to the slight deviation from a 50-50 distribution in the arbitration awards. The Ford-UAW relationship seems to be more akin to a "legalistic" rather than to a "bargaining" relationship, whereas the reverse is true for the Affiliated Dress Manufacturers-ILGWU.

An arbitrator's "legalistic" approach may, in turn, reflect a "legalistic" relation between labor and management which may develop out of a bargaining relation between two parties capable of wielding considerable economic and political power, as is true in heavy industry such as automobiles. "Legalism" betokens a commitment by the parties to both institutional norms and institutional means. Under conditions which remain to be specified, a "legalistic" relation between labor and management may be conducive to the growth of a "legal" relation, which we shall interpret to mean a high degree of consensus, between the parties, on goals, norms and means.*

The analytic distinctions between "legalistic" and "legal" relations, on the one hand, and "power" and "bargaining" relations, on the other, bear further consideration in relation to the arbitration process. As was indicated above, when a power relationship obtains between a union and a company — or, for that matter, between any two organizations — there is a low degree of consensus with regard to goals, norms and means. In such a situation, it is not uncommon for the parties to use illegitimate authority, such as force or fraud, to protect or promote their *interests*.

As a bargaining relation develops, consensus on goals remains low; similarly, consensus on norms may be fairly low, which is why the grievance machinery is often overburdened. However, consensus on means may be fairly high; e.g., work stoppages are curtailed and grievances are processed.

*For an analysis of deviant behavior in which the concepts "goals," "norms" and "means" are used in much the same manner as in this section, see (9, pp. 148-149). See also some related observations on a study in progress, bearing on the "movement from power to justice" in (24, pp. 122-123).

TABLE 2

TYPE OF LABOR-MANAGEMENT RELATIONS* BY PATTERN OF ARBITRATION AWARDS AND INCIDENCE OF ARBITRATED GRIEVANCES

Type of Labor Management Relations	Consensus** on Goals	Consensus** on Norms	Consensus** on Means	Pattern of Arbitration Awards	Incidence of Arbitrated Grievances
Power	—	—	—	No arbitration process	Zero
Bargaining	—	—	+	Dependent on relative bargaining strength	High
Legalistic	—	+	+	Slightly dependent on relative bargaining strength	High
Legal	+	+	+	Independent of relative bargaining strength	Low

*Only four logically possible types of labor-management relations are discussed in this paper. It is not thereby implied that the remaining four logical types are all null classes; in fact types (—+—) and (++—) may be empirically significant and related to the four types analyzed.

**High degree of consensus is designated by (+) and low degree by (—).

Each party in bargaining about the terms of employment agrees to sacrifice a favored object or course of action.

A variant of a bargaining relation and possibly a sequel to a mature bargaining relation is what we called a "legalistic" relation. This inter-organizational state is characterized by a high degree of consensus on both norms and means. In fact, "legalism" involves a heightened awareness of existing *rights* of the parties as embodied in the growing corpus of norms comprising the collective bargaining agreement. Increased sensitivity to the provisions of the contract in turn may inhibit actions in violation of the "private law." Sabotage and slowdowns become as difficult for workers to undertake in concert and with the consent of the union as lockouts are for management. As the degree of consensus on goals, between labor and management, increases, a "legalistic" relation is transformed into what we have termed a "legal" relation, i.e., one in which both parties share in considerable measure a commitment to common goals, norms and means. The relationship between each of the four modes of labor-management relations to the pattern of arbitration awards and to the incidence of arbitrated grievances is presented in Table 2.

In the transformation of a labor-management relationship from one in which "bargaining" or "legalism" predominates to one in which "law" predominates, a permanent arbitrator may play a significant role. If he maintains and articulates his commitment to a set of potentially common goals, norms, and means, he may help socialize the parties into these principles of actions.* If he should succeed in this effort, the pattern of arbitration awards, as is hypothesized in Table 2, would decreasingly bear any relationship to the relative bargaining strength of the parties. Moreover, and virtually by definition, the higher the degree of consensus between the parties on goals, norms and means, the lower the incidence of grievances of various kinds, including grievances referred to arbitration.** Thus in a

*See, for a discussion of the "educational functions" of the permanent arbitrator, (25, p. 251).

**It is possible that this is not a linear but a curvilinear relationship. In other words, the incidence of arbitration cases is high in a "legalistic" relation, somewhat lower in a bargaining relation, and still lower in a "legal" relation (see Table 2).

labor-management relationship which is predominantly "legal" in character, it is hypothesized that there would be a lower incidence of arbitrated grievances than in a "legalistic" or a bargaining relation (see Table 2).

A case in point is the development of a "legal" relationship between Hickey-Freeman Company and Amalgamated Clothing Workers of America (29), a set of parties which in regards to relative bargaining strength is not unlike Affiliated Dress Manufacturers-ILGWU. With the signing of the first contract in 1919, an arbitration system was established providing for an office of an impartial chairman to which an economist, William Leiserson, was appointed. Leiserson not only made arbitration awards which were deemed "fair and equitable," but also took pains to explain his decisions, "thereby creating a code of industrial ethics which could give guidance to both union and management representatives" (29, p. 12). After writing an opinion on an arbitration case, he would offer to appear at management conferences and union meetings in order "to hammer out, on the anvil of free discussion, general acceptance of the principles which he helped to form" (29, p. 16). In 1922, Leiserson's decisions were distilled into a series of rules on major labor-management problems. As these norms became generally known and accepted, the number of grievances referred to arbitration began to diminish. From 1930 to 1948, when the report on this labor-management relationship was written, not a single grievance was referred to arbitration (29, p. 17). In socializing the parties into the goals, norms and means implicit or explicit in his arbitration opinions. Leiserson helped them to develop a "legal" relation and hence a capacity to resolve their conflicts without the intervention of a third party. And in performing his role as an arbitrator with expertise, he thereby worked himself out of a job, which is allegedly "the goal of all competent and successful arbitrators" (8, p. 323; 3, p. 312).

Summary and Conclusion

A preliminary and illustrative analysis of labor arbitration cases involving the discharge penalty was conducted for two sets of parties. The hypothesis that relative bargaining strength is a determinant of the arbitral decision process was clearly confirmed for the Affiliated Dress Manufacturers-ILGWU, but only partially confirmed in the case of Ford-UAW. In an effort to account for the slight deviation from the expected distribution of arbitration awards, a distinction was drawn between "legalistic" and "legal" types of labor-management relations and these types were compared with "power" and "bargaining" relations. The differences among these types of relations are manifested in their profiles on three dimensions: goals, norms and means.

The utility of these concepts for an analysis of labor arbitration — and possibly other inter-organizational phenomena as well — awaits further research. Additional sociological inquiry into the problem preliminarily explored in this paper would have to overcome the deficiencies which the writer encountered in the collection of data. In particular, a large sample is necessary — instead of the N of 2 — of labor-management parties equal and unequal in relative bargaining strength, controlled for such variables as type of arbitration clause, type of discharge clause, type of arbitrator (permanent vs. *ad hoc;* umpire vs. impartial chairman), etc. Furthermore, a multi-dimensional measure of bargaining strength, more refined than our single dimension of "completeness," may prove more discriminat-

ing. For example, an index based on the three group properties of completeness, size, and stability of membership may turn out to have more predictive power than our unidimensional index.

The analytic distinctions among the four types of labor-management relations point to problems of a broader scope than those which evoked them. For example, are the sequences of types of labor-management relations patterned? Is there a secular trend toward the transformation of labor-management relations from those in which power predominates to those in which "law" predominates? Or is there a cyclical process at work, possibly related, for example, to business cycles, or changes in internal organizational structure? Since conflicts over some values — e.g., allocation of profits to wages, dividends, investment, etc. — are probably endemic in labor-management, these may erupt and generate a movement from "legal" relations to "legalistic," bargaining, or even to "power" relations. What types of changes in labor-management relations in fact occur over time and what the conditions for changes of different types are, constitute significant theoretical problems in inter-organizational relations which also have considerable practical import.

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THE GIRARD COLLEGE CASE: RESOLUTION AND SOCIAL SIGNIFICANCE*

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THE CASE**

The Girard College case, which has attracted national attention because of its implications for the areas of law, social science, and race relations in the United States, concerns an institution in the City of Philadelphia which provides maintenance and education through secondary school for "poor male white orphans" under the terms of the will of Stephen Girard, French-born Philadelphia merchant and banker, who died in 1831. The school began operation in 1848 and

*I am grateful to Merton L. Reichler of the Department of Political Science, Wellesley College, for a careful reading of this paper and a number of valuable suggestions.

**My connection with the Girard College case began in 1954 when I was invited to become a social science consultant on the case to the City Solicitor's Office in Philadelphia. My assignment, in collaboration with Dr. Ira DeA. Reid, Professor of Sociology, Haverford College, was to draw up a memorandum dealing with the changes in knowledge and climate of opinion about race and race relations since Stephen Girard's time which were pertinent to the request for legal relief from the racial restriction on admission to the College, and also to present and assess the social science evidence dealing with the effects of segregated education on children and the community. I did not testify as a witness in the case. At a later time, I published an article describing certain legal and social issues in the case (9); the case was at that time in only the first stages of the extensive litigation described herein.

the value of the estate and school property is now more than 98 million dollars. In accordance with Girard's specifications, the estate and school have been administered by the City of Philadelphia, since 1869 through a "Board of Directors of City Trusts" (created by an act of the state legislature), twelve of whose members are private citizens who serve without pay, the remaining two members being the Mayor of Philadelphia and the President of the City Council, serving *ex officio*. Thus for over a century, the city of Philadelphia, through a variety of special boards, administered a trust which is used to operate a boarding school and home for male orphans (numbering currently about 1100) excluding those who are not members of the white race. Against the background of changing social conditions and conceptions in the area of race relations occurring in the second quarter of the 20th century, a legal challenge to the racially restrictive admissions policy materialized in 1954.

This challenge came from two sources: (a) a private suit instigated on behalf of several Negro applicants for admission to Girard College, and (b) a parallel suit brought on behalf of the City of Philadelphia acting through the Mayor and the Commission on Human Relations and represented by the city's legal representative, the City Solicitor, petitioning the appropriate Court to compel the Board of Directors of City Trusts to change its admission policy to admit non-whites to the College.* The curious situation whereby two branches of the city government were thus joined in legal contest with each other came about as a result of the fact that the Board of Directors of City Trusts (excluding the *ex officio* members) claimed for itself a quasi-private nature exempt from municipal direction. Questions raised in the litigation concerned such issues as the "equal protection of the laws" clause of the 14th Amendment to the federal Constitution, the nature and relevance of "public policy" with regard to racial relations, the role of changing social conditions in justifying modification of the terms of a charitable trust through the equity jurisprudence doctrine of *cy pres*, the nature of "state action," the question of whether, in fact, the Board of Directors of City Trusts exercised functions which made it subject to the constitutional restrictions on governmental action, the effect of educational segregation on white children, and the relevance of testimony obtained from the social sciences.

Litigation began in the Orphans' Court of Philadelphia County which unanimously found for the Board of Directors of City Trusts thus, in effect, maintaining the racial restriction on admission to Girard College (6). The case was then appealed to the Supreme Court of Pennsylvania which upheld the Orphans' Court in a 5-1 decision (7). On appeal, the United States Supreme Court then reversed the ruling of the Pennsylvania Supreme Court in a unanimous *per curiam* decision on the ground that the Board of Directors of City Trusts was, in fact, a state agency and thus subject to the limitations of the 14th Amendment (14). (A petition by the Board of Directors of City Trusts for a rehearing was subsequently denied.) Significantly, however, for the outcome of the case, the United States Supreme Court in its decision did not order that the Negro boys be admitted to the College, but remanded the case to the Pennsylvania Supreme Court for, in its words, "further proceedings

*The Commonwealth of Pennsylvania, as a contingent legatee, also joined in the litigation on the side of the City of Philadelphia and the Negro applicants.

not inconsistent with this opinion." The Pennsylvania Supreme Court, in turn, remanded the case to the Philadelphia Orphans' Court. This court was now faced with two alternative possibilities. It could order the Board of Directors of City Trusts to open the doors of Girard College to non-whites under continued city administration of the school (this was interpreted by many observers at the time as being the import of the United States Supreme Court decision), or it could remove the Board of Directors of City Trusts as trustee and substitute a private trustee, and maintain the racially restrictive admissions clause. It chose the latter course, announcing its intention of appointing a trustee to serve in a private capacity (8). This move was, in turn, appealed by the City of Philadelphia and the private litigants (the Negro applicants for admission) to the Pennsylvania Supreme Court, which sustained the transfer of trusteeship, and this decision was once again appealed to the United States Supreme Court. On June 30, 1958, the highest court unanimously upheld the decision of the lower courts and thus sustained the removal of the Girard Estate and the administration of the College to the care of a private trustee with its racially restrictive admissions policy intact (15). A petition to the United States Supreme Court for a rehearing was filed by the attorney for the private litigants, but was denied by the Court on October 13, 1958. The case is now legally closed and, in the future, Girard College will be operated under a private board of trustees and continue to exclude Negroes from admission to its benefits.*

*Philadelphia's population of over two million is about 21 per cent Negro, and, ironically, Girard College is located in the heart of what is now a lower-income Negro area.

The Significance of the Case

The case's general significance lies in the convergence upon it of three areas or sectors of American life and thought: law, social science, and race relations. It provides, then, an unusual opportunity to study the interrelations of these three areas, as well as the specific substantive implications of the case's disposition for each of the three areas separately. Directly involved are the interpretation of the laws pertaining to charitable trusts, the legality of bequests containing a racial restriction made to educational institutions, the effect of changing social conditions on the goals of charitable bequests left in perpetuity, the nature of the distinction between private and public education and thus the application of the restrictive clauses of the 14th Amendment, the effect of changing social conditions on the legal doctrine of "public policy," and the role of the social scientist as "expert witness" in a court of law. These can best be specified in a series of questions, for all of which the arguments and decisions in the Girard case are pointedly related.

1. What implications does the case and its disposition have for the law of charitable trusts with regard to bequests left with a racial restriction as to the beneficiaries?

2. To what extent should changing social conditions allow a court, using the equity jurisprudence doctrine of *cy pres*, to modify the interpretation of a deceased donor's charitable trust bequest so that goals more harmonious with contemporary social conditions and values may be effected?

3. What degree of involvement by governmental agencies in on-going social processes in the community is sufficient to be adjudged "state action" and thus to come under the application of the "equal protection of the laws" restriction of the 14th

Amendment to the federal Constitution, with particular reference to discrimination based on racial classification?

4. To what degree is racial discrimination contrary to "public policy" of the federal government, states, and municipalities, and thus subject to legal ban when any measure of governmental action (as, for instance, legal enforcement of private contracts) is summoned for enforcement?

5. In an era when sociological and social psychological evidence is beginning to be used in courts of law (a notable example being the School Segregation Cases (1) in which, in 1954, the United States Supreme Court declared racial segregation in public education to be unconstitutional), what are the merits and demerits of such evidence in legal adjudication; what degree of caution is required of social scientists in presenting and interpreting such evidence in courts of law; and, conversely, what degree of scientific sophistication is required of members of the legal profession in evaluating such evidence?

Full and detailed answers to these questions, each of which has numerous ramifications and complexities, must await monographic treatment of the case;* however, some suggestions as to the answers may be derived from the briefer treatment allowed in these pages wherein we will, somewhat arbitrarily, group the issues under the broader rubrics of *legal issues, socio-legal issues,* and *social science issues.*

LEGAL ISSUES

Central to this portion of the discussion is the 14th Amendment to the Constitution of the United States with its famous clause which forbids a state to deny to any person within its jurisdiction "the equal protection of the laws." It was this clause which was used by the United States Supreme Court to strike down racial segregation in public education in 1954, reversing the "separate but equal" doctrine enunciated in the *Plessy v. Ferguson* decision of 1896. The argument of the City of Philadelphia and the Negro applicants was that the Board of Directors of City Trusts is an agency of the City. Since cities are legally creations of the state and are uniformly recognized as exercising state powers, the Board of Directors of City Trusts must therefore be considered as using the power and authority of the state to deny Negro male orphans access to those benefits made available to whites. Thus the 14th Amendment was being violated.

The Board of Directors of City Trusts, sustained by the Orphans' Court and the Pennsylvania Supreme Court, countered this argument by asserting that the Board was acting only in a *fiduciary* capacity — that is, as a trustee, and that fiduciary action of a governmental body can be distinguished from its normal *public or governmental* activity, as when it exercises ordinary governmental functions, and its *proprietary* capacity, as when it operates a public utility. *Fiduciary* action, according to this argument, is not state action and therefore not subject to the restrictions of the 14th Amendment. The Philadelphia Home Rule Charter adopted in 1951, it was pointed out, had specifically exempted the Board of Directors of City Trusts from its provisions, thus indicating its special nature. The Board, in this interpretation, is an agency which is engaging in the solemn task of carrying out the wishes of a private testator. It is not using public funds and is not carrying out

*I will be carrying out a full-scale study of the Girard College case in 1960-61 on a fellowship awarded by the John Simon Guggenheim Memorial Foundation.

state action. This argument must be seen, further, against the background of the thus far undisputed right of a testator to create a charitable trust for whatever purpose he wishes so long as it does not violate the law or public policy.

This last point deserves emphasis. Much was made in the course of the litigation, by the Board, the Orphans' Court, and the Majority Opinion of the Pennsylvania Supreme Court, of the unfettered right to bequeath one's property as one chooses. "Subject, of course, to compliance with all applicable laws," Chief Justice Stern, of the Pennsylvania Supreme Court, stated in his Opinion, "it is one of our most fundamental legal principles that an individual has the right to dispose of his own property by gift or will as he sees fit; indeed this right is so much protected that a testator's directions may be enforced even though contrary to the general view of society . . . and however arbitrary, unwise, intolerant, discriminatory, or ignoble his exercise of that right may be. He is entitled to his idiosyncracies and even to his prejudices" (7).

Much discussion was occasioned in the Philadelphia press throughout the period of litigation, centering on the right to will one's property without restriction and according to preference and in some quarters the City's attempt to open Girard College to Negroes was viewed as an attack on the "sanctity of wills" and the right to leave one's property as desired. The law does recognize a distinction between an ordinary bequest made to individuals and that made for charitable purposes in perpetuity, but even the latter type is given wide latitude, and, in point of fact, there are many charitable trusts whose benefits are restricted to particular racial or religious groups. The Supreme Court's decision in the Girard College case contains nothing which threatens the legality of such racially or religiously restricted charitable trusts, provided that they are administered by a *private,* rather than a *public,* trustee.

In sum, in the Girard College case, the United States Supreme Court, in its first decision, may be interpreted to have enunciated the principle that a racially restrictive charitable trust may not be administered by an agency of the state. This ban includes municipalities and municipal agencies, since these are creations of the state. In the specific instance, the Board of Directors of City Trusts was declared to be "an agency of the State of Pennsylvania," and thus its refusal to admit Negroes was a violation of the 14th Amendment. (The Court's decision specifically refers to *Brown v. Board of Education.)* The attempt to have "fiduciary" action by a state agency exempted from the restrictions of the 14th Amendment was thus struck down.

By its second decision, in which it refused to negate the action of the Orphans' Court in transferring the Girard Estate to a private trustee, the supreme court of the land, *inter alia,* reaffirmed by implication the traditional right of a testator to set up a charitable trust with racial restrictions, so long as the trust is administered by a private trustee. The 14th Amendment, it will be remembered, does not ban *private* acts of racial discrimination.

Socio-Legal Issues

The City of Philadelphia and the private litigants were well aware of the fact that their legal effort must attempt to validate two propositions, rather than just one: first, that city administration of the Girard Estate with the racial ban intact was unconstitutional — this, we note, was accomplished—and secondly, that the

solution to the problem was not to turn the estate over to a private trustee with its racial ban intact, but rather to eliminate the racial ban and retain the administration of the estate for the Board of Directors of City Trusts — that is, to maintain its public character but on a racially unsegregated basis. The principal legal mechanism by which this could, potentially, be accomplished is the equity jurisprudence doctrine of *cy pres* (literally, in Old French, "so nearly" — that is, the doctrine of approximation). This doctrine permits courts of equity to modify the provisions of a will while remaining within the general framework of the donor's intent, and can be brought to bear when a particular provision of a charitable trust has become illegal, impracticable, or impossible of fulfillment. Thus, if two provisions of a will become, in the passage of time, opposed to each other and impossible of simultaneous implementation, the legal problem then becomes that of determining which is more central to the donor's intent. In this case, it is worth noting that over the century and a quarter of the Girard Estate's history, two provisions of Girard's will had already been changed by order of the Orphans' Court. In 1868 the Court had authorized the Board to allow leases of property from the estate for a period of longer than five years, and in 1950 the Court had allowed the sale of some portion of the real estate. Both of these procedures, made economically advantageous by the passage of time, had specifically been forbidden by Girard in his will. Moreover, the Court, in an even earlier decision, had interpreted the term "orphan" to include fatherless children with living mothers.* All of these procedures argued for a historical record of some flexibility in the interpretation of the Girard will.

In attempting to retain the public character of the Girard Estate and Girard College, the City used two principal arguments:

1. that Girard's designation of the City of Philadelphia as the trustee of his estate and college indicated a firm desire on his part to have his institution administered under public auspices; furthermore, that in the 125-year history of public administration, including the necessary passage of several state legislative acts and numerous city ordinances to enable various aspects of this administration, the public financial management of the two million dollars bequeathed for the college up to its present figure of nearly 100 million dollars, and the continuous oversight of the affairs of the College, had so permeated the Estate with a public character as to

*In this connection, the comments of Justice Musmanno of the Pennsylvania Supreme Court in his Dissenting Opinion are worth quoting at length: "It is strange that the Majority makes no reference to the most drastic change of all in Girard's will. If anything was made clear in the Girard will it was that he was creating a trust estate for the benefit of orphans. The question has arisen as to whether the term "orphan" should mean orphans regardless of race, but there can be no question that the beneficiaries had to be *orphans*, that is, children who have lost both father and mother. We know, however, that the Board of City Trusts admits to Girard College fatherless children who have living mothers.

"Webster's Unabridged International Dictionary defines an orphan as: 'A child bereaved by death of both father and mother, or less commonly of either parent — in the latter case sometimes called half-orphan.' But the Girard will did not speak of half-orphans. It spoke of orphans. In any event, if the word orphan is intended to include fatherless children, why does it not also embrace motherless children? Are children of 6 to 10 years in less need of a mother than a father? I believe that this Court in the case of *Sookan v. City of Philadelphia*, 33 Pa. 9, was entirely justified in including fatherless children under the term *orphan* because it was interpreting

make it impossible to strip away its public nature.

2. that Girard's concern, as specified in the will, for the general nature and quality of the educational experience that the students of his institution should have, made it necessary, with the passage of time and the changing conceptions of race and racial relations, for the racial ban to be removed. Girard had instructed that the students be taught "the purest principles of morality," that they should learn to "evince benevolence towards their fellow creatures," and should develop "a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions." It was at this point that the City introduced social science considerations and testimony from expert witnesses in the attempt to show that, while in the context of Girard's era, the exclusion of Negro boys would have been natural (as I have written elsewhere), "the subsequent abolition of slavery, the adoption of the other Reconstruction amendments, the development of public concern for equality of treatment, the accumulation of scientific knowledge about race and racial equality, the desegregation of education, and the rise of modern theories of good educational practice have brought about a state of affairs which demands the abolition of the color bar in order that Girard's concern for the moral and spiritual quality of the orphans' education might be effected and the College remain abreast of the times."*

The City's contention, then, was that Girard's provision for placing his college under public auspices and his concern for the moral and spiritual welfare of its scholars were more central to his general intent than the exclusion of non-whites; since the racial ban conflicts with the more important provisions, the *cy pres* doctrine should be used to eliminate the racial ban and the College should be retained by the City.

By effecting the transfer of the Girard estate to a private trustee, the Orphans' Court and the Pennsylvania Supreme Court ruled against this contention. The relevant judicial decisions found that Girard's primary intent included the specification of "white" male orphans, and that the question of who or what agency should administer the trust was subsidiary to this primary aim of the trust. Reference is made to the legal doctrine that no trust shall "fail" for want of a trustee. According to this doctrine, if the original trustee will not or cannot

*See (9, p. 57).

the spirit of the Girard will which was directed toward taking care of children who were poor and in need of attention and care.

"But if the word *orphan,* for reasons of benevolence and humanity, was to be enlarged to encompass children who have lost their father but not their mother, why did the interpretation not include those children who have lost a mother but still have their father? Charity should not strain at mere words nor walk on the stilts of syntax. Stephen Girard's primary objective was to befriend poor children without adequate care. Since this Court allowed Girard's meaning to break through the imprisoning syllabic walls of *orphan,* why did it then limit the freed meaning to fatherless children?

"The Majority, quoting from the case of *Franklin's Administratrix v. City of Philadelphia,* 2 D.R. 435, said that despite various 'onslaughts' on the Girard will, the Girard charity was left 'fixed, firm and immovable as a rock.' It has been shown, however, that the granitic stability of the will did not prevent a softening of its provisions to allow the sale of real estate, it did not hamper the augmenting from 5 to 15 years of leases, it did not interfere with the humanitarian enlargement of the term *orphan* to include children with a mother living. Why must it then remain implacable in the presence of the Fourteenth Amendment to the Constitution of the United States?" (7).

carry out the terms of the trust, a new trustee may be substituted. Prior changes allowed by the Orphans' Court in the business administration of the Girard estate are designated as administrative changes which are sanctioned by law and do not violate the substantive provisions of the trust. The United States Supreme Court, in refusing to reverse the action of the Orphans' Court in transferring the Girard estate to a private trustee, in effect, supported this view of the matter. One might logically infer, then, that, barring some unusual emphatic statement by the testator of a desire for a public trustee, all trusts with racial exclusionary clauses now in the hands of a public trustee may similarly with legal approval be transferred to a private trustee with their exclusionary clauses intact.

In the initial judicial opinion on the case, the Hearing Judge of the Orphans' Court, while not contesting the claim that substantial changes in racial relations had taken place since Girard's lifetime, held that the social science testimony had not proven that students at the college were injured by the racial exclusionary policy. His opinion characterized the evidence offered by the City in this connection as unconvincing since it is "opposed by countervailing factual and credible subjective experience testimony" dealing with the "exemplary records of citizenship" (5, p. 27) possessed by the graduates of the College, the description by the College's administrators of the nature of the school curriculum, and the opportunities which Girard students have for association with Negro boys outside the classroom. While the United States Supreme Court made no mention of the social science considerations in its brief initial decision, the logical inference from both of its actions is that either the Court did not consider Girard's concern for the moral quality of the education of his scholars as sufficiently weighty to override his racial specification in a *cy pres* issue, or that the social science testimony used to attest a failure of his purpose in regard to the quality of the students' education was not convincing.

Two further issues, of rather opposite import, are worth attention here, although considerations of space allow only the briefest of comments on them.

First, does the Supreme Court's permission of the transfer of Girard College, an educational institution, from public to private hands provide any legal comfort to those Southern states hoping to escape the constitutional ban on racially segregated education by turning their public schools over to private auspices? It is to be doubted that it does, although it would be surprising if the case does not turn up as a prominent citation in the briefs of desperate attorneys seeking to justify such a procedure in some future desegregation action. Surely, however, a large substantive difference obtains between a vast network of public schools created and operated by state legislation, municipal ordinances, and public taxation, on the one hand, and a boarding school for orphans created by one man's will and testament and operating under the formidable legal umbrella of testamentary rights in the disposal of private property, on the other. And there is no reason to suspect that the Supreme Court is incapable of appreciating the magnitude of the difference!

A more subtle legal question concerns the issue raised by the Supreme Court's first decision in the Girard litigation in finding that the City's administration of the Girard estate constituted "state action." When seen in conjunction with the Court's 1948 holding in *Shelley v. Kraemer* (17)

— to wit, that court enforcement of privately made restrictive racial covenants on property violated the 14th Amendment — it poses at least some further consideration of the question of what degree of state or public involvement in the enforcement of a racially discriminatory provision must be present before the prohibitions of the 14th Amendment become operative. All testamentary action operates through probate courts, which are creations of the state. Does a racially restrictive charitable trust, bound over to a private trustee but only through the action of a court which is an agent of the state, violate the "equal protection of the laws" clause?* The Supreme Court in its second decision in the Girard litigation — approving the transfer of the estate to a private trustee — would seem to have answered this question empirically in the negative. But to this writer's knowledge it has enunciated no conceptual principle which clearly distinguishes such probate action from the type of judicial action enjoined in *Shelley v. Kraemer.* Lawyers with a philosophical bent—or, conversely, philosophers with a legal bent — should find interesting food for thought here.

Social Science Issues

Evidence from the behavioral sciences with their emphasis on experimental method, as distinct from, say, economic and social welfare reports (the "Brandeis brief" already, of course, has a history) is beginning to make its way into litigation, and both the legal profession and the social scientists are becoming increasingly aware of both the problems and the opportunities thereby created (2, 3, 4, 9, 10, 11, 12, 16, 18, 19).

*See the discussion in Miller (13, pp. 97-122). The Girard College litigation had not been completed when Miller wrote his analysis.

The Girard College case adds another chapter to the story, and an interesting one, not because the social science testimony bulked large in the judicial decisions — it obviously did not — but because the issues raised by the testimony of sociologists and psychologists with respect to the specific points in dispute, in conjuncture with whatever judicial attention they did receive, illustrate many of the important problems attendant on the submission of such evidence. It is possible in this paper to deal only (and briefly) with two of the most compelling — what we shall call (a) the *relevance* problem, and (b) the *social science expert role* problem.

Relevance. The City, in its legal briefs and presentation of oral testimony, had sought to prove that education in an all-white boarding school such as Girard College was injurious to the students because they would be deprived of the frequent equal-status contact with Negroes which, it was contended, is necessary for the development of non-prejudiced attitudes and for preparation for increasingly frequent equal-status contact with Negroes in the adult world which the students would enter after graduation. The testimony of Ira DeA. Reid, Professor of Sociology at Haverford College, Isidor Chein, Professor of Psychology at New York University, and Alice V. Keliher, Professor of Education at New York University, was particularly relevant here. A number of experimental studies were mentioned in the testimony, including the Deutsch and Collins study of interracial housing, and the *American Soldier* study of token integration in the Army during World War II, to show that equal-status contacts with Negroes reduces the prejudiced attitudes of whites. Professor Chein emphasized his own (and Deutscher's) survey of the opinions of social scientists con-

cerning the effects of enforced segregation on both whites and Negroes,* a study dealing with various levels of prejudice in white children, and the rapidly changing times with regard to the increase in frequency of equal-status racial contacts in the adult world. No study of Girard students or Girard graduates had been carried out, however, and counsel for the Board made much of this fact, and also pointed to the excellent reputation of Girard alumni in the community, the modern curriculum at the College which included inter-cultural materials, and the opportunities for contact with Negroes in extra-curricular activities and in home visits. The Hearing Judge of the Orphans' Court, we recall, held that the social science evidence on this point was unconvincing and countervailed by the opposing testimony.

The broad issues posed by these opposing arguments, it seems to us, can be stated as follows:** in any given litigation, a party to the litigation who wishes to introduce social science evidence is faced with two alternatives. Either (a) he can foresee the need for and expend the resources to execute an experimental study which deals precisely with the issue and personnel*** which are directly involved in the substance of the litigation; or (b) he can search the literature for studies which have been carried out already and have some relevance to the issues and personnel of the substance of the case. If he chooses the latter course, he is faced with the question of how similar the variables in the published studies are to the variables in the substance of the instant litigation. The social science expert has the obligation in his testimony of objectively explicating the similarity (or lack of it) of the variables, and the bench and counsel will require sufficient sophistication in the logic of experimental method to be able to critically evaluate and probe this explication. Such a counsel (no pun intended!) may be one of perfection, but it seems to us to be the model which is required if the growing use of social science materials in litigation is to prove maximally useful and minimally confusing.

*Which had been cited in a footnote in the Supreme Court decision in the School Segregation Cases.

**Compare discussions in (9; 12; 16; 18).

***Of course, it may be a sample.

The Social Science Expert's Role. In two vigorous articles, Edmond Cahn, Professor of Law at New York University, has criticized the cogency of social science testimony offered in both the School Segregation Cases and the Girard College case, and made a plea for complete objectivity and candor on the part of the social scientist concerning his evidence when he appears in the witness stand (2, 3). The particular target of his criticism in the Girard case is Professor Chein. To explicate and comment on all the points of controversy would take considerably more space than is available here; however, a portion of Cahn's attack involves the charge that the evidence of injury to white students in segregated education was highly inconclusive and that Chein's claim in this regard was based largely on the *opinion* of himself and other social scientists rather than on the presentation of rigorous experimental studies. In this connection Cahn quotes from a letter written by Chein to Will Maslow, Counsel of the American Jewish Congress, and made available to Cahn, in which Chein had commented on Cahn's previous criticism of the social science testimony in the School Segregation Cases. In this letter Chein had stated:

> More fundamentally, I think that Professor Cahn does not understand the

use of expert testimony in juridicial processes.

He complains that the social scientists did not prove their case. In point of fact, I believe that expert witnesses never state the scientific basis of their opinions in their direct testimony and rarely even under cross-examination. When expert testimony becomes detailed and technical it is generally to specify that about which the expert is delivering an opinion rather than to indicate the basis on which he reached that opinion. . . .

I would defy an ordinary judge and jury to be able to follow the cogency of the technicalities of scientific evidence and hence I would assume that the above described state of affairs is justified. The law provides an entirely different device to prevent a scientific expert's abuse of his status and prestige as a scientist — namely by permitting the appearance of opposing experts if such can be found. In the segregation cases, apparently, no such opposing experts could be found with respect to our testimony.*

One may suggest that aspects of this controversy may be clarified if it is kept in mind that much of expert testimony that has traditionally been used in courts of law is of the type provided by physicians and psychiatrists in which judgments on the issue at hand are made from extensive familiarity with case materials in similar instances of a clinical nature. The recent introduction of the experimental social scientist into the litigation picture — a person who is trained to carry out experiments under controlled scientific conditions (or to know to what degree he is doing so), using data in quantity, and evaluating the results statistically — adds a new dimension to the proceedings. Thus we may distinguish between *clinical* expert testimony and *experimental* expert testimony. While there may be a place for clinical expert testimony on the part of the social scientist, this writer agrees with what would appear to be Professor Cahn's contention that the types of generalization which the social scientist is called upon to make depend for fundamental verification on experimental data of a quantitative nature, and that it is incumbent upon the social scientist to rely principally upon such data and to be ready to submit the details and logic of such experimentation** to cross-examination and judicial scrutiny. Such a position does not rule out the submission of clinical opinion but suggests the responsibility of labeling it as such and distinguishing it from generalizations based on experimental studies.

*Quoted in (3, p. 185).

Conclusion

We have attempted to deal in these pages with some of the major legal and social issues of the Girard College case in which the last will and testament of the colonial and early 19th-century Philadelphia Merchant Prince became a source of controversy in the vastly changed metropolis of another age. No claim is made that all of the issues of the case have been delineated or that those discussed here have been exhaustively treated. In particular, the ambiguous but potentially portentious concept of "public policy" and its relevance for racial discrimination, which wound its way in and out of the lawyers' briefs and judicial opinions, has received no attention here. However, the main outlines of the case and its significance have been presented, and a few concluding remarks may now be made.

The United States Supreme Court in its decisions on the Girard College case obviously pursued a policy which, when considered from the point of view of the goals and contentions of the opposing parties, was squarely "middle of the road." Under different interpretations, the Court could have allowed the college to remain in city hands on a segregated basis, or it could have eliminated the racial ban

**This includes, of course, the *ex post facto* as well as the *projected* type of controlled experiment.

and declared that the college must remain under city administration. It did neither. Instead, it forbade the city to administer the college under segregated conditions, and subsequently sanctioned its transfer to a private trustee. While Negroes who might be otherwise eligible for admission to the benefits of the college obtained no substantive relief in the particular instance, the total effect of the litigation, from the point of view of the movement to eliminate racial segregation from American life, was to extend the prohibitions of the 14th Amendment to trustee action of state and local governments. This is by no means an insignificant step. Chief Justice Stern of the Pennsylvania Supreme Court, in the initial Majority Opinion which found for the *status quo* (7), had declared that if the City's contention that it could no longer administer the college under conditions of racial exclusion were upheld, the victory would be a "Pyrrhic" one since it could only result in the appointment of another trustee. With this evaluation we disagree, even though the eventuality it alluded to came to pass. The major import of the United States Supreme Court's action in the Girard College case was to remove yet one more important class of activities from the ever-narrowing scope of governmental participation in racially discriminatory action. At the same time, sincere and ardent defenders of the right of an individual to bequeath his property according to taste have been given no cause for alarm. All those who look forward to the disappearance of racial discrimination from the manifold sectors of the American scene might logically welcome a succession of such Pyrrhic victories.

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THE CASE IS REMANDED

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Among egalitarians (and particularly anti-segregationists) it is quite probable that the Supreme Court decision in the school segregation cases* will come to occupy a prominent position in the catalog of hallowed pronouncements on the meaning of American democracy. Already there is an incipient movement to promote commemoration of the event through appropriate annual nationwide observances. But for the sociologist whose concern is with the empirical problem of determining the specific changes wrought in the social fabric of the South by the decision in the segregation cases, the subsequent opinion of May 31, 1955 (5), is the crucial one. For it was in this opinion that the Court remanded the case before it to the lower courts and laid down the guide lines to be followed in the subsequent interpretation and enforcement of its 1954 declaratory judgment. In summary, the Supreme Court instructed the lower court judges as follows:**

1. Racial discrimination in public education is unconstitutional and all provisions of federal, state, or local law permitting such discrimination must yield to this principle.
2. School authorities have the primary responsibility for elucidating, assessing and solving the varied local school problems which may require solution in fully implementing the governing constitutional principles.
3. In fashioning and effectuating the decrees, the courts will be guided by equitable principles characterized by a practicable flexibility in shaping remedies and a facility for adjusting and reconciling public and private needs. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a non-discriminatory basis.
4. Courts of equity may properly take into account the public interest in the elimination (in a systematic and effective manner) of the many obstacles that stand in the way of a systematic and effective transition to school systems operated in accordance with the constitutional principles enunciated, but the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
5. While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full com-

*Including (4; 3; 10; 11). Hereinafter referred to simply as *Brown v. Board of Education*.

**Quoted in part and paraphrased in part from (5).

pliance with the ruling of the Court. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner.

6. The burden rests on the defendant school officials to establish that additional time is necessary to carry out the ruling in an effective manner.
7. The courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.
8. The courts will also consider the adequacy of any plans the defendant school officials may propose to meet these problems and effectuate a transition to a racially nondiscriminatory school system.
9. During the period of transition, the courts will retain jurisdiction of these cases.

At first glance these guidelines to judicial behavior appear as but an open invitation to federal judges in the South to subvert the Supreme Court's ruling by allowing school boards to delay indefinitely the integration of Negroes and whites in the public schools. Such an interpretation is implicit in the remark of Senator Eastland* (Mississippi) that the Supreme Court, had, by its May 31, 1955 decision, "left the question right where it had been in the beginning," that is, in the hands of local people who understood the issue. Insofar as it reflected the easy assumption and belief that federal judges in the South as "white men" reared in the traditions of the region were desirous of maintaining these traditions, Senator Eastland's remark is correct. But as diverse and loosely drawn as they may seem, the rules do contain a stern warning to the local judges against permitting their personal inclinations and desires to impede unduly judicial implementation of the desegregation ruling. (Noté especially the admonition that the courts "will require . . . a prompt and reasonable start toward full compliance.") In order clearly to comprehend the meaning of the Supreme Court's detailed instructions, it is necessary to put in focus the context of events out of which these emerged. This can best be done through an analysis of the manner in which lower court judges had responded to the prior (i.e., pre-1954) rulings of the Supreme Court in related cases. The present paper is primarily concerned with this facet of the problem.

It is almost literally impossible to determine with exactness the number of cases filed in the federal courts of the South bearing on racial discriminations in publicly supported education prior to 1954.** But our best estimates are that between 1939 and 1954

*Interview reported in *Jackson Daily Democrat*, May 21, 1955, p. 1. In like vein is the comment by Tom Tubb, Chairman of the Mississippi State Democratic Executive Committee: "We could not ask for anything better than to have the matter placed in the hands of our Federal District Court. They will consider suits in good faith and in the manner in which they understand Mississippi's racial problem." Special dispatch, *New York Times*, June 1, 1955, p. 30.

**Part of this difficulty stems from the fact that the nature of the legal issues involved is not always determinable from the title given an action.

(the crucial years in terms of later events) approximately 250 such cases were filed. Barely half of these ever reached the calendar stage; of those placed on the calendar, probably no more than 65 actually came to trial.* The cases tried, however, ran the gamut of the major discriminations practiced. These ranged from complaints alleging racial discrimination in pay for teachers, inequalities in physical plants, school curricula, to denial of admission to state supported institutions of higher learning, including graduate and professional schools. A singular feature of these pre-1954 cases is that they seldom directly challenged the separate but equal doctrine. Consequently, the federal judges who heard them were free to apply that doctrine in rendering final judgments. But each successive appeal to the Supreme Court brought forth a more restrictive principle in the application of the separate but equal doctrine.** and it became increasingly difficult to utilize the doctrine in judicial protection of the basic policy of separation. Nonetheless, the distinguishing characteristic of lower court responses to these suits is the consistent effort to accommodate the "new" legal principles established by the Supreme Court to the traditional race relations structure in the region, with a minimum of damage to the latter. Space does not permit detailed analysis of the numerous actions of lower court judges which lend support of this generalization. What follows is merely illustrative.

The Salary Equilization Suits. In 1940 the Supreme Court denied *certiorari* from a circuit court ruling (1) holding that the policy and practice of paying Negro teachers less than white teachers of like qualifications and performing similar tasks was constitutionally prohibited. In consequence of this ruling, numerous suits for equalization of teachers' salaries were filed throughout the South.*** Southern school boards were thus faced with the prospect either of reducing the pay of white teachers to that of Negro teachers, or of increasing the pay of the Negro teachers to the levels of the whites, or of finding constitutionally valid means of maintaining the existing discriminatory pay policy. To search for the latter was the most commonly adopted of these alternatives. Two basic approaches were made. First was the effort to rely upon a defense of cost.**** This approach urged rejection of the Negro teachers' requests for immediate relief on the grounds that immediate institution of a single pay scale would wreck the public school system since their budgets were incapable of absorbing this extra burden. The second approach made was to abandon all existing pay scales and substitute therefor a uniform schedule based upon a teacher's individual rating on some evaluation procedure (21). Since these latter were to be applied to all teachers, the ratings assigned could then be offered to support a variable salary schedule. Further, under the scheme, if Negro teachers were rated below whites, this fact could be adduced as objective evidence in support of the Board's prior contention that whatever salary plan had existed in the past, it had been objectively based on non-racial considerations. Consequent upon the presentation of a petition from the Negro teachers of Atlanta for equalization of salaries and the later appeal to the courts to enjoin continuation of its discriminatory pay policy, the Atlanta School Board adopted an elabor-

*Our count reveals 49 reported cases. See various units of (20).

**Cases in point include (16; 22; 24).

***For a partial listing of such suits see the Appendix to (12).

****Typical of these cases is (17).

ate rating procedure for placing teachers on an equally complex "track and step" salary schedule. Basically, the former involved the appointment of teacher rating committees from within the system who were to evaluate and recommend a rating for each teacher in the system. Evaluations were to be based on such factors as level of training, experience, principals' and supervisors' reports, and committee observations of performance in the classroom. The composite rating given the teacher was to determine her place under the new salary scheme. This latter consisted of six tracks each with a gradation of fourteen salary steps based on levels of training and years of experience in the Atlanta system.* While the rating committees evaluating white teachers usually included a white classroom teacher, no Negro teacher was ever appointed to a rating committee. Upon completion of the city-wide evaluations, the salaries of many teachers (including some Negroes) were raised in order to place them on the proper track and in the correct step. Nevertheless, Negro teachers *as a group* were rated significantly below white teachers *as a group,* with the end result that there was no basic change in the dual pay policy. When the issue came to trial on the complaint of the Negro teachers that the new arrangement was but a scheme for continuation of the past policy, the School Board pleaded that the new scheme provided an objective basis for determining teachers' salaries, that the rating committees had applied the evaluative criteria with scrupulous objectivity, that whatever injustices might have occurred were not the outcome of a differential application to the two classes of teachers of the rating criteria but were, instead, the consequence of human error stemming from handling so many cases; and, finally, that any teacher who felt himself wronged had an adequate recourse in the administrative procedures for appeal. Upon completion of the hearing, the District Judge upheld all of the major contentions of the Negro teachers and granted the requested injunction (21). The School Board's plea that the Negro teachers were not properly before the court since they had not exhausted the administrative remedies provided by the Board and state law, was dismissed with the assertion that the appeals provided for were more illusory than real since they required the Negro teachers to appeal for relief to the very parties who had committed the original wrong (21, p. 445). Nonetheless, the School Board, on appeal, rested its case almost exclusively upon this defense of failure to exhaust administrative remedies. On these grounds the Circuit Court reversed, holding specifically that the administrative remedies provided were not to the same parties since the Negro teachers could appeal the decision of the local superintendent and school board to the state Board of Education which had the power to reverse (7). When examined in the light of the factual situation, this appears, indeed, to be a tortuous bit of reasoning. In the course of the trial the Atlanta Board had defended its pay schedule by pointing out that the salaries of all teachers included a state subsidy and the State Board had established a scale which allowed the local board less per Negro (regardless of qualifications) than per white teacher. In short, the Circuit Court made it plain that a Negro teacher who felt himself wronged by the operation of the new salary scheme must first appeal to the local superintendent (who had initially determined the alleged discriminatory pay), thence to

*The operation of the system is explained in (9).

the local school board (which had specifically approved the alleged discriminatory salary), and, if still unhappy, to the State Board of Education which (by allocating the state teacher' supplement to local boards on a racially discriminatory basis) had firmly fixed the discriminatory pattern on a state-wide basis. Only after utilizing these "impartial" parties, decreed the judges of the Fifth Circuit, could the Negro teacher appeal to the courts for relief.

It is not without significance that this appellate court decision came at the very moment when the legal attack on inequalities in educational opportunities for Negroes was rapidly gaining momentum in the states of the "deep South." In practical consequences, the decision served to protect in the following fashion basic elements in the regional patterns of life:

1. By temporarily closing the door to outside relief (i.e., direct and immediate appeal to the courts) and thus forcing the Negro teacher to submit, even momentarily, to the judgment of local whites in matters economic, the decision re-emphasized for the Negro his subordinate position in the social scheme.
2. By lengthening the period between initial complaint and the institution of legal suit, the decision afforded local school boards additional time in which either to inaugurate equality of pay (which policy could then be cited as having come through no outside pressure but only as further evidence of the good will of whites towards Negroes), or, if they chose otherwise, to perfect schemes whereby the differential pay policy was made compatible with the new legal requirements.
3. By resting its decision squarely on the exhaustion of administrative remedies doctrines, the Court provided a direct case in point for the subsequent defense of school boards which, in the opinions of Negroes, delayed overly long in meeting their requests for improved facilities. It should be carefully noted that following this decision, every state in the deep South revised its administrative remedies acts so as to foreclose direct appeals to the courts in school matters of all kinds.
4. By restating the doctrine of exhaustion of administrative remedies as described above, the decision made appellate fatigue an occupational hazard among Negroes seeking to effect basic shifts in the race relations structure through resort to legal actions. It may well have been assumed by the judges of the Circuit Court that the waning of hope (the hallmark of appellate fatigue) would constrain Negroes in the deep South to accept a policy of gradualism.

Today in mid-1959, five years after the declaratory opinion overruling *Plessy v. Ferguson* and fourteen years after the Circuit Court opinion cited above, the public schools of the deep South are as segregated as in 1912. Likewise it is in these states that the last remnants of the discriminatory teachers' pay policy remain.

The Equalization of Facilities Cases. No less illustrative of the determination of the lower court judges to fit the Supreme Court's narrowing interpretation of separate but equal into the traditional southern scheme were their responses to suits for equalization of school facilities, curricula, and related matters in the pre-1954 years. Two distinct patterns emerged. First was a vigorous reliance upon judicial

discretion. This was made manifest in a complex of allowable discretionary acts. Grants of immediate relief only in the most exceptional cases and always in scrupulous regard for the principle of separation, prolonged retention of jurisdiction and refusal to enter a final decree (thus effectively foreclosing appeal), grants of long trial delays and declaratory opinions with denial of immediate relief are but a few of the devices used (12, pp. 430-433). Not at all atypical of this pattern was one judge who found

> . . . that there is a grievous difference between the physical paraphernalia of the white school . . . and the colored (6)

but who, nonetheless, concluded:

> . . . the *permanent* restraint is that these broken windows, and this broken roof, *must be fixed at once gentlemen. As to the other relief, it will be denied* (6).*

Nor is there anything unique in the behavior of another judge who found the principles of the *Sweatt* case inapplicable in an almost exact parallel situation (13). He could

> . . . find no evidence . . . that a Negro lawyer attending the [white] University . . . would enjoy a higher standing with the judges, . . . lawyers, . . . litigants, jurors, and witnesses, than he would enjoy if he attended the [Negro] . . . law school. I would not think that it would make the slightest difference with a judge who is fit to sit on the bench, nor should it have any appreciable effect on the jurors who are sworn to do their duty according to the evidence in the case. . . . (13, pp. 329, 331).

Not only did this judge find "no substantial advantage" to the Negro applicants in being admitted to the white law school, but, also "that the best interests of the [Negroes] will be served in denying [admission]" (13, pp. 329, 331).

The second distinct pattern of response to be found in the lower court reactions to suits for equalization is one of defense of the southern way of life. This was especially evident after 1950 when it was clear to all concerned that the end of *Plessy v. Ferguson* was in sight. Against this tendency a three judge court declaimed

> The Constitution . . . does not authorize us to obliterate social or racial distinctions which the state has traditionally recognized as a basis for classification for purposes of education. . . . It is the duty of this Court to honor the public policy of the State in matters relating to its internal social affairs quite as much as it is our duty to vindicate the supreme law of the land (14).

In yet another case, the local judge, *after carefully detailing 18 specific inequalities between the Negro and the white schools,* not only *denied the Negro plaintiffs any substantial immediate relief but* even *refused* to *fix a reasonable time within which the School Board would be required to eliminate the inequalities identified.* (19). More revealing, however, is his estimate of the total situation and definition of the role of the courts in dealing with it contained in this exceprt from his opinion:**

> In the last analysis, this case and others like it present problems which are more than judicial and involve elements of public finance, school administration, politics and sociology. The right of Negroes to educational facilities *substantially* equal to those furnished to whites is now *almost* universally recognized; but it must *finally* depend for its vindication and realization *upon* the *enlightened public opinion* of the people. The federal courts are not school boards; they are not prepared to take over the administration of the public schools of the several states; nor can they place themselves in the position of censors over the administration of the schools by the duly appointed and qualified officials thereof, to whose judgment and good faith much must be left. Neither can the federal courts properly endeavor to formulate or alter the public policies of the several states, *nor should they, except in most extreme instances, try to interfere with the mores and customs of a people in a matter as delicate and potentially explosive as race relations.* In such

*All emphases supplied.

**All emphases supplied.

matters the courts ought to proceed slowly and with great care. . . . (19, p. 984).

Insofar as they relate to post-1954 desegregation cases coming before the lower courts, the most obvious implication of the judicial responses illustrated by the cases cited above is an apparent determination to wreak no sudden and revolutionary change in public school practices in the South. Despite some on-the-surface appearances to the contrary, careful analysis of post-1954 decisions demonstrates that the patterns of judicial response parallel those of the pre-1954 decisions, e.g., long delays before trial, affirmation of the constitutional right to be free of state imposed segregation in the public schools but denial of immediate relief, rigid adherence to the exhaustion of the administrative remedies rule, and defense of inaction or reluctance to act by local school officials.* Thus, what Judge Lemley set forth as *obiter dicta* in 1948 he treats as a firm principle of law in 1958 and uses it as a basis for ordering a two and a half year delay in integration in Little Rock (8). Judge Parker's delineation of the limits of the Supreme Court's 1954 opinion (2) finds its antecedent parallels in Judge Taylor's decision (16) in the first Clinton, Tennessee case as well as in Judge Timmerman's impassioned defense of segregation in the first Clarendon County case (3). Even as this is being written a federal judge in Delaware is busy writing the opinion justifying his decision to allow that state a twelve year period in which to integrate (23, p. 1). Thus, in that state at least, a majority of the Negro children who entered the public schools of Delaware for the first time in 1958 are condemned to a career of public school segregation until high school graduation in 1970.

From the evidence at hand, it appears that the judicial responses to the pre-1954 school suits have become the models for the post-1954 judgments in the desegregation cases. Consequently, there is little reason to expect fundamental and wholesale changes in the patterns of school segregation in the states of the upper South for at least another decade. For the states of the Deep South little basic change may be expected for at least another decade and a half. It is always possible, of course, that upon appeal to the Supreme Court, the process may be ordered speeded up. Since that court has, however, so far shown a great reluctance to overrule the lower courts on the specific issue of the time allowed to complete desegregation, there appears to be little help forthcoming from that direction. Now that the principle of desegregation has been legally proclaimed, it may well be that its speedy accomplishment will depend upon the political rather than the judicial branch of the government. As Negroes acquire and exercise increasing power in the election process, it is likely that they will be able to utilize this to achieve faster desegregation — especially in the urban areas.

*See various issues of (20; 23).

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VALUE CONFLICT AND LEGISLATION*

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I

We will begin, first, by establishing the meaning of value conflict and examining some of its correlates; and, second, by identifying the nature of legislation and law.

Whenever man, through the conjunction of surplus-producing plow agriculture and effective social organization, enters upon civilization he also soon confronts the problem of how to solve certain perplexing conflicts of values (7, pp. 464-472; 10, pp. 46-48). It is, of course, not true that in a small-scale community, like an Eskimo band or Polynesian village, everybody thinks and feels alike; but such communities are normally free of sectarian schisms, rival philosophies, or radical minorities which urge polygyny, monogamy, nudism, or a new way of worshipping. The very size and density of population under plow agricultural and urban conditions encourage the discovery of new ideas. Ideological, unlike technological change, however, is not normally cumulative. That is, new ideas are not always combined with older ideas to produce more complex but integrated systems of thought. Rather, the new ideas may generate several, radically divergent systems which embody opposite values and these become attached to different groups or categories of the population. Conditions of life, too, are favorable for people to band together to propagate their newly found interests. Thus cultural variety blossoms and at the same time a problem is created because all the values which men originate are not likely to be found mutually attractive. Of course, some newly discovered values soon disappear. No attempt may even be

*The Institute for Research in Social Science, University of North Carolina, gave assistance in preparing this paper. Research on Pakistan was aided by several grants from the University Research Council.

made to implement them in action. A very few value innovations may be adopted universally. Others, slow to disappear or to become widely popular, become the subject of active or aggressive organization by proponents who seek to realize them through action. Value conflict, in the social meaning of the term, occurs when the active way in which some values are propagated is accompanied by equally determined resistance on the part of other people. Value conflict implies that two or more parties in society hold different views about the goodness, logic, or beauty of something.

Legislation designates the action taken by a community (or its head) in deciding that a particular deed is legal or illegal and what should be done in the event that an illegal deed is committed. Although legislation often is invested with positive intentions, for example, the maximization of health or the opportunities of children, women, industrial workers, or some other status category, it also threatens to reduce the liberty of some people, namely those who violate the legislative norms. Were certain violations of norms not likely to occur, then there would be little direct need for a particular form of legislation. Of course, when legislation is intended to restrain a reprehensible deed, like theft or murder, this antilibertarian feature troubles relatively few persons. Nearly everybody agrees that thieves and murderers should not be free to perform their acts. Strictly speaking, legislation should be distinguished from the larger concept, law, which refers to the enforcement of legislation through a court. Later we shall return to this distinction.

A summary of what follows may be helpful. It will be argued that although there exists a strong tendency to try to deal with value conflict through legislation and law, legal coercive power is not suited to resolve real opposition in standards. Instead, three things may be predicted: first, that when value conflict becomes the subject of the legal process, one party to the dispute becomes severely disadvantaged, quite without regard to the merits of its position; second, a limited, sectional, social conflict is made more general, involving more nearly the total community; and finally, the level of disequilibrium in social relations is heightened. These consequences are not grounds for abandoning all efforts to control the active expression of value conflict through legal means. They do, however, serve to remind an imaginatively fertile animal, which is much given to originating new ideas, that it is not equally ingenious in preventing creativity from becoming socially disjunctive.

II

We now proceed with the thesis of this essay. Value conflict may be more or less painful depending on the degree of importance which people attach to the values in opposition and on the extent to which the conflict expresses itself in interpersonal relations. Given a painful value conflict, it is reasonable to assume that people will attempt to terminate the condition. Man, it will be agreed, has been notably unsuccessful in acquiring resources, other than means of punishment or deterrence, for skillfully managing conflicts in his social relationships. Certainly he is little able, for example, to resolve painful value conflict by effecting reconciliation or what Mary Follette called "integration" (3). The western world particularly, perhaps as a function of the deeply radical character of some of the oppositions with which it has to cope, definitely distrusts reconciliation as a device for solving value conflict. (The

legal systems of some African people, like the Lobedu, make considerable use of reconciliation but the small scale of these hoe-using people is normally associated with purely personal, rather than basic ideological, conflicts [8].) Logical argument is manifestly unsuitable for deciding conflicts of this order because logic works best when the emotional tone of the dispute is relatively neutral, that is, non-value-laden ideas are in opposition. Of course, there are always such forms of social pressure as shaming, ridiculing, and other forms of "convention" (10, p. 56). But these are also not likely to work when the conflict involves organized groups deeply committed to rival viewpoints. The attempt to shame into conformity is not apt to be successful when directed against people who are convinced of their superior inspiration and enlightenment. Anyhow, shame would never resolve the underlying conflict. It would only impose one viewpoint over another and this same limitation is intrinsically bound up with the use of legislation to end value conflict. Yet, very often in situations of this kind one party to the opposition moves to gain assistance from the huge resources of legal coercive power maintained by the community. To do this an organized group (perhaps because it is in numerical majority, holds disproportionately heavy power, or commands influence with an influential neutral party) must succeed in embodying its position in legislation. Recourse to legislation, that is, the claim for government support, may be variously justified. The majority seeking to resist a heretical minority may claim that its numerical preponderance gives it superior rights. In many modern nations the assumption on which this argument is based carries considerable weight. The party claiming legal support may argue that its position, threatened by the opposition's values, is already guaranteed by the most basic general norms of the community (e.g., by a constitution). Therefore, the counter-position, being unconstitutional, must be explicitly restricted.

The reader will perceive that whenever a real conflict of values is involved it is fallacious to think that the solution can come directly through legislation. To reason otherwise is to commit what might be termed the "legal fallacy." Law can restrict expression of a conflict but it cannot by itself resolve viewpoints in opposition.

It is possible that the moral power of a legislature or legislator may be so great that the act of legislation converts a section of the population to new beliefs and in doing so removes support from one set of conflicting values. Or, the "majesty" of the law and the awful power of government, which now back one viewpoint rather than the other, may induce proponents of one set of standards not only to lose heart but to change their convictions. Such indirect effects, however, do not indicate that legislation and law themselves solve value conflicts.

Several consequences can (by hypothesis) be predicted to follow when value conflict becomes the subject of legislation enforced through law. For one thing, one party to the conflict, quite apart from any merits or weaknesses in its position, becomes severely disadvantaged. We see this with respect to religious minorities and particularly in the case of the nineteenth century Plains Indians confronting Americans of European extraction. Whatever other variables were involved in the conflict, these two categories of people were of very different minds about the goodness of Indian ritual. To the Indians ceremonies like the Sun Dance were an-

nual events of joy. They brought inspiration and blessing. Perhaps it is true that such ceremonies were bound to disappear as the conditions which had facilitated them and given them meaning vanished, but until then the rites gave meaning and security to life. Quite different sentiments motivated the American Christians who saw themselves as representatives of a civilized power and who, with exceptions, regarded the Indians as savage, wild men equal to untamed beasts. In a situation made complex by the clash of yet other values plus the land-hunger of westward-moving settlers, the conflict over religion led to legislation which up to 1934 recognized no right of religious freedom for Indians (1, p. 175; 2, Ch. 12). Such legislation naturally favored one set of values, Christian, supporting them with government strength. The second set of values, equally precious we assume, was at a stroke of the pen reduced to the status of illegality. The American Indian case is hardly the only instance of this kind that could be cited for the era of colonialism. Nor is the use of legislation to back one set of values over another limited to colonialism or to situations of culture contact, as narrowly conceived by some anthropologists. Recourse to law can also occur in an intracultural value conflict. It happened in North Carolina where, following the Supreme Court decision on school segregation, legislation known as the Pearsall Plan was passed to protect the interests of people who wanted to resist integration. The public school system could be sacrificed if a local community wished to prevent the education of white and Negro children in the same classrooms. Legislation in northern states, aimed at protecting the constitutional rights of Negroes against discrimination, also succeeded in placing people with contrary values at a serious disadvantage.

Value conflict is essentially sectional, involving parties who disagree over certain norms. It is true that such sectional disputes may have repercussions throughout a society. A second consequence which can be predicted when value conflict becomes the subject of legislation enforced by law is that sectional conflict becomes more nearly general. The dispute between two sects or two doctrines is made a matter of total community concern as soon as one side gains the support of legal, coercive sanctions. The police, courts, and public must now take cognizance of the behavior which the legislation specifically prohibits or declares aberrant. It is, of course, likely that those value conflicts which by their very character are already fairly general will have the best chance of being embodied in legislation. In this category of fairly general conflicts are the contemporary disputes in Pakistan over a man's free right of polygyny (need he secure permission from a court before he can marry two, three, or even four women?) and over the morality of publicly registering marriage and divorce (5). The highly orthodox Muslim party to the conflict claims that scripture and custom hallow a man's right freely to marry up to four wives and make acts like marriage and divorce personal, that is, acts in which the community can have no proper right to interfere. The more liberal party maintains that such vital aspects of family life cannot remain outside of the modern community's interest or concern. Obviously, the second position can only realize itself by successfully getting appropriate legislation passed (formerly through parliamentary action but, following Pakistan's revolution of 1958, by presidential order).

A party to a conflict may seek legislation with the deliberate intention of

making the dispute general and in the process winning over a neutral block. People with such an aim are not dismayed by a third possible consequence of bringing value conflict under the purview of law: heightened disequilibrium. Any conflict in a community may be assumed to involve a measure of disequilibrium, but the level of that state may increase after one party, although perceiving itself to have been seriously disadvantaged, still remains firmly committed to implementing its values. That party, then, has little recourse but to continue to act with integrity even though its deeds have become illegal and are threatened by a predictable penalty. Increased law breaking is a new dimension added to the value conflict. The opposition may claim, with some reason, that the law is being flaunted. But even rigid imposition of legal penalties each time a violation of the law occurs may not succeed in preventing deeds which while obnoxious to one sector of society are very desirable for another. We see signs of heightened disequilibrium following the United States' Supreme Court decision to enforce the Fourteenth Amendment of the Constitution with respect to school segregation. This decision, which has been sought by persons valuing greater social inclusiveness than had obtained previously, certainly does not itself constitute legislation, as certain critics of the Court maintain. Until 1954 school segregation, maintained legally in the South, had not been identified as contradictory to the constitutional provision forbidding a state to "deny to any person . . . the equal protection of the laws." Then the Supreme Court, acting like any court in interpreting the particular in the light of the general, found southern school laws to be unconstitutional. That the court reversed itself is not very noteworthy; after all parts of a cultural heritage are always being reinterpreted as times change (7, p. 237-241). However, those people who valued separate educational facilities for Negroes and non-Negroes did not accept the authority of the Court in this instance. Movements in certain southern states of resistance, interposition, and circuitous attempts to maintain segregation all had a more or less clear character of flaunting the law and sometimes were found legally to be of such nature. It would be difficult to maintain that disequilibrium in the United States has not increased following the Supreme Court's decision in this case.

III

Attempts to resolve value conflicts through legislation and law may lead to serious disadvantages for one party, raise sectional struggles to a more general level, and increase social disequilibrium. However, these consequences can scarcely be taken as reasons for abandoning all efforts to control the expression of value conflict through legal means. It may be well, however, to understand objectively how such attempts work. That has been the aim of this essay.

We have said nothing about a special kind of legislation pertinent to a discussion of value conflict, the kind which sets up administrative structures to implement the values of some section of the population. It is not that an existing, valued state of affairs is declared illegal, but that strong measures are legislatively encouraged to bring about certain transformations. In the underdeveloped countries at the present time ambitious programs of community development are underway. In many of these an urban-based, elite group of the population, imbued with western values and the hope of creating a strong, prosperous, modern nation, is engaged in trying to step up food production, raise health stand-

ards, and increase the amenities of rural people. The attempt has been given legislative sanction. The resistance which such programs encounter suggest that the new ways are not entirely popular and that they embody some radically divergent values (4, p. 3). But the campaign to alter culture nevertheless goes forward toward what the planners perceive to be the goal of a better life.

Recourse solely to legal action in cases of value conflict, we have said, leaves the basic issue unresolved. To illustrate, let us return to the dispute in Pakistan over the morality of "family legislation." Seemingly, here is a conflict over whether a husband shall have a free right of divorce, whether he can readily marry up to four wives, plus other related issues. Underlying these we perceive a more baisc dispute: what is Islam and what direction shall it folow (6)? It is difficult to sum up the alternative positions in this opposition. Many solutions are proposed and particular theologians are sometimes inconsistent in their statements. Very briefly, however, we can imagine that we are witnessing a debate between traditional and revisionist (i.e., liberal) points of view, both of which profess to be orthodox. The traditional Muslim scholar maintains that Islam is a God-given religion, God's direct word being contained in the Arabic text of the Quran. What an omniscient God revealed to Mohammad is for all time; for the God-given cannot be good or true at one time and undesirable or false at another. Man cannot by legislature or otherwise alter God's commands. In other words, a truly Islamic nation cannot claim that supreme power is held by the people or by their representatives in parliament. Rather, sovereignty belongs to God. The revisionist accepts the Quran as divine revelation. He, too, agrees that Islam is for all time, but the interpretation of the spirit of God's word changes. The Quran contains certain general moral principles; the forms in which they can best be implemented in order to realize God's will for man vary with time and place. Now, "family legislation" would not only decide that indeed a man does not have free right or polygyny, it would favor one or the other opposed theological viewpoints. But obviously legislation could not satisfactorily decide how the basic opposition should be resolved because the conflict is over the limits of legislation itself! It seems likely that similar radical value conflicts are hidden in any hard-to-handle social dispute, even in the world's persistent problem of whether and how to promote international organization. These questions cannot be resolved by legislation just as the basic division over social inclusiveness in the United States cannot be reconciled through law which rules segregation to be legal or illegal.

While they remain vigorously alive, disputes over important values can contribute considerably to societal disequilibrium. The tenor of social life is disturbed when one or both sides publicly seek to justify their positions, reconcile their aims with other values, and seek to recruit more practitioners or followers. But such airing of positions is an important means of examining, testing, and measuring the worthwhileness of norms. To implement tentatively some value, like one for nonsegregated schools or for a particular national language, under carefully controlled experimental conditions is at present quite impossible.

That man will discover new techniques for dealing more skillfully with value conflict remains in doubt. We scarcely know what form such techniques could take or what higher values would be required in order that

they might operate. While the United States leads in seeking new ways of reaching further into space and better destroying enemies, relatively slight encouragement is given to looking for new ways of resolving value differences.

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SOCIOLOGY, CRIMINOLOGY, AND CRIMINAL LAW

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Despite a growing rapprochement over recent years, years representing a "high point in the periodic flirtation between law and social science" (20, p. 94), there remains a considerable gap between the values and practices of the social sciences — particularly the triumvirate of anthropology, sociology, and psychology — and those of law. David Riesman, who knows these disciplines well, has noted that lawyers are still "very apt to be scornful of the findings of social science" (36, p. 651), and a legal writer has seemingly reflected accurately the general opinion of his colleagues with the charge that the social sciences possess a "grievous absence of understanding of the law's objectives, a resulting failure to apply legal methods, and little awareness of the real contributions of legal philosophy to social objectives" (40, p. 5).

It is the intention of this paper to look briefly into some of the more yawning of the gaps between the social sciences, especially sociology, and the law. The discussion will first consider the general relationship between law and sociology, using criminal behavior as a general background, and then will turn to an examination focusing on the study of criminal law and criminology, areas in which the social sciences and law often have had both their closest contact and their severest disagreement.

Attention will be paid, in turn, to (1) sociological contributions toward the understanding of law, including the particular field of *sociology of law;* and (2) legal contributions to sociology, particularly as represented by studies labelled *sociological jurisprudence.* Following this, some at-

tempt will be made to point out a few of the underlying strains which exist between sociology and law, as these inhere in personnel, value commitments, and methods.

Sociology and Law

Partly by default, partly by design, and largely through the operation of what might be called academic squatter's rights, sociology has been the major social science represented in the investigation of criminal behavior. Anthropologists have generally confined themselves to ethnographic material on crime and to theoretical evaluations, sometimes seeming to be little more than sophisticated exercises in semantics, relating to the presence or absence of systems of criminal law among pre-literate groups (7; 25, pp. 17-20; 34, p. 22). Psychologists, on the other hand, have generally restricted their investigations to the area of criminal evidence, contributing material on various devices such as polygraphs and narcoanalytical drugs, and experimenting with methods related to interrogation and eye-witness reports (7; 19). In addition, of course, clinical psychology and psychiatry have concentrated staggering amounts of energy on attempts to resolve questions concerning legal insanity and responsibility, questions which touch, most basically, on commitments to free-will and deterministic philosophies (16; 24; 30).

Given its academic pre-eminence and virtual monopoly in this field, it is surprising how very little sociology has contributed to criminology's understanding of law or, conversely, how little criminology has contributed to general sociological thinking about either broad systems of legal control or those relating particularly to criminal affairs.

Traditionally, the main vein of sociological thought has regarded law as one of a considerable number of means of social control, serving in a general way to coerce or cajole members of the society, under some but not all conditions, into conformity. Sociological debate still seems fixated, more than half a century after Sumner's *Folkways,* on determining the exact relationship between the mores of a society and its laws as these influence behavior. A recent survey of sociological textbooks, in fact, besides pointing to the gross concentration on this particular problem, also noted the rather widespread disagreement on its resolution (11). It is certainly true, as Merton has pointed out, that this "problem has yet to be posed in a way that will supply a sound answer . . . by indicating the conditions under which law results in a change of mores" (26, p. xxi), and it is also true that a considerable range of other significant problems in this area both need to be raised and grappled with.

Sociology of Law

Contributions from the specific field of *sociology of law* have barely made an impress either on criminology or on the main body of sociological thinking. Timasheff, a pioneer in this field, pointed to historical antagonisms between law and sociology (noting, for instance, that Comte had believed that the law was merely an emanation of the metaphysical spirit and would soon disappear), but hoped for a rich harvest in this nascent area of investigation which he defined as "the determination and coordination of human behavior . . . by the existence of legal norms" and which he believed was particularly important for criminology (45, pp. 30-32). Two decades after his original statement, however, Timasheff conceded that "interaction between general sociology and the sociology of law has been superficial" and he anticipated that it would probably remain so until sociology of law

developed "something tangible and sufficiently verified to offer for incorporation into the central core of sociological theory" (46, p. 424).

SOCIOLOGICAL JURISPRUDENCE

Some sparse contributions to sociological understanding of the law have come from legal scholars who are grouped generally as members of the school of "sociological jurisprudence" (32; 33). There exists the suspicion, however, (like the one familiar to college students when they first spread abroad the news that they are majoring in "sociology") that there is considerable confusion in the term "sociological jurisprudence" between the scientific discipline of sociology and the ethical practice of social welfare.

Benjamin N. Cardozo, for instance, in an analysis of the decision-making process among judges, points to examples of what he labels "sociological" methods and advocates their conscious use in all-other-things-being-equal cases. In the field of homicide, Cardozo notes by way of example, there once existed a conflict between the legal tenet that a person could not benefit by his own crime, and the equally-well rooted principle that the desires of a testator should be observed with scrupulous care. Faced with the question of whether a murderer should be allowed to benefit under the will of the person he had killed, the courts, Cardozo observes, resorted to "sociological" considerations, taking into account the general moral feelings of the community, and ruling that he should not (8, pp. 40-43). It is one thing, of course, to consider the empirical determination of the sentiment of the community a sociological question, another to imply that the ethos of sociology would favor a decision in line with this sentiment. Cardozo intermingles the foregoing considerations, and it is likely that he and many legal scholars would be disappointed to learn that the second is not considered germane to the field of sociology, and that they would think less of sociology for this.

Another legal approach has been the attempt to determine systematically the relationship between changes in law and the values of the society, an approach that is probably best represented by Hall's *Theft, Law, and Society* (17). The ways in which legal problems relating to theft were met in 18th-century England, Hall shows, were closely related to cultural changes, and when the substantive law lagged behind social need both technicalities and legal fictions were resorted to in order to bridge the gap. Despite its claim that it employs social theory as its dominant perspective, Hall's study would be more familiar to social historians as a type of research approach than to sociologists. It is this situation, the fact that scholars on either side of the sociology-law bridge are working different veins with different instruments — each one regarding its method as intrinsically more worthwhile — that has led, in part, to the general lack of inter-disciplinary rapport, some statements of which have been noted above, others of which are summed up in the rather petulant remark of a leading legal scholar that "over the years I [do not] find too much effective effort at neighborliness, let alone brotherliness, from the side of the social disciplines, or of sociology in particular" (23, p. 1287).

ROOTS OF DISUNITY

The lack of professional camaraderie between law and the social sciences may either account for or be traceable to the fact that the two major instances in which the legal system has made use of social science findings have both given rise to sharp criticism. Juvenile court laws, actually a social work innovation but considered "sociological"

by lawyers, have been related to an apparent worsening of the situation that they were supposed to have alleviated, as well as to a considerable disregard of some basic constitutional rights (15; 29). In addition, the brief reference to social science findings in the Supreme Court decision on racial de-segregation has, as is well known, added an element of polemical vulnerability to the decision itself (2; 6).

Legal denegation of these social science contributions provides several clues to the general relationship between law and the social sciences. Part of this denegation is undoubtedly a reaction to the threat of alien interference with an understood, time-tried process. It is something of a paradox that legal practitioners are, on the one hand, seduced towards the social sciences by the example of leaders of the academic bar, yet, on the other hand, are repelled from these sciences by their own professional need for predictable certainty and surety, regardless of the price in logic or empirical reality at which this certainty is sometimes purchased. Put more simply, it must always be kept in mind that lawyers trade on their ability to predict the outcome of the legal system *before* the system itself arrives at its results. Any interference with this process, real or imagined, represents a formidable threat.

It is also true, of course, that the lawyer is at least as ethnocentric as the rest of us and uses his professional training and position as a system of technical barbed wire to keep outsiders, such as social scientists, on the nether side. Equally important too is the fact that the lawyer is traditionally a man of affairs; the social scientist, though he is becoming more so (37), still suffers from the declasse fact of his almost total immersion in academia. As Veblen has noted, on many campuses the presumed social and business savoir faire of the law professor is reflected in a higher salary, lower teaching load, and committee and administrative power (14; 47, pp. 30, 214). These real differences in status seemingly manifest themselves in the reluctance of lawyers to give greater credence to the findings of social science (or, more accurately, to provide situations where findings of some note might be forthcoming). Status considerations seem to be important in at least partly explaining the intense conflicts between pathologists and psychiatrists — professions equivalent to or higher than that of law — and lawyers, in contrast to the general apathy existing in legal-social science relations.

Criminology and Criminal Law

These general considerations carry over into the specific instance of the relationship of criminal law and criminology. Both fields, it is interesting to note, are themselves low status in the broader areas they represent; both are rather peripheral to the main current. On the other hand, both enjoy a certain protection from total professional obloquy; criminology because it is popular with students and therefore a bread-and-butter course in sociology departments (18, pp. 331-337; 22; 31); criminal law because it often provides an avenue of political mobility for its practitioners, especially district or county attorneys.

The fortuitous placement of criminology in departments of sociology in the United States has had a critical impact on its relationship to the law. It is the object of this concluding section to examine the implications of this situation, implications which, above and beyond the circumstances mentioned earlier as affecting the general relationship of sociology and law, add a further dimension, since criminology deals directly with the ele-

ments of criminal law, rather than with abstract legal systems.

The early history of criminology provides some clues to its present status and to what are seen as its present difficulties. The study of criminal behavior gained its own rationale and denotation in 1882 when Ferri named as "criminal sociology" studies which embraced "the experimental data of anthropology, of physio-psychology, and of criminal statistics, together with the means indicated by science (repressive or preventive) to combat the phenomena of crime" (13, p. 2). Ferri in his writings set forth a deterministic philosophy of criminal etiology, abrogating moral responsibility (39, p. 491), and thus set the stage for a philosophic rupture between sociological investigations of criminal behavior and legal conceptions of such behavior (21).

The word "criminology" itself was essentially a shorthand convenience for "criminal anthropology." It was suggested at a professional conference (12, p. 31), and adopted with enthusiasm by the popular press (3, p. 325). Once defined as "sociology," criminology readily became incorporated into this new discipline which extended its realm into unclaimed academic interstices. Criminology particularly fit into the early sociological concern with "sin, sex, and sewage" (5, p. 145), but when sociology itself shifted radically from its social action and social welfare ethos into a virtual value vacuum criminology inevitably became, in the jargon of its parent discipline, an isolated subculture. The significance of this development cannot be over-emphasized, for it appears obvious that only if sociology itself commands all the keys to human behavior can criminology, as a sociological subsection, come to possess a monopoly in the explanation of criminal behavior. Sociology, of course, rarely pretends to such heights, and its findings blend with those of other disciplines with other approaches to form something of a variegated explanatory pattern of human behavior. Criminology, we are saying, confined to the role of a sociological offspring, tends to produce a skewed view of the behavior it deals with.

"[T]he possibility of a science of criminal behavior," one of the keenest of criminologists once wrote, "is similar to the possibility of a science of any other behavior" (41, p. 24). General sociological theory, however, has been able to select the type or form of behavior it could best investigate, while criminology has been more severely restricted in its subject matter. Thus sociological theory readily developed beyond a welfare concern to examine units more compatible with its predilictions. There is, for example, considerable difference in analyzing small groups per se in contrast to analyzing small groups of schizophrenics or small groups of criminals. In the first general instance, findings from sociology may be highly significant, in the second, that of the schizophrenic group, they may supply only a minor inventory of important information on schizophrenic behavior, and in the third instance, that of criminal groups, they may represent but one of a number of equally worthwhile approaches.

What is being said, then, is that criminology, once committed to a sociological framework, initially profited tremendously by gaining significant and unexplored insights — one needs but to compare the sophistication of American criminological effort to that of continental investigators to mark this. But, after the groundwork had been placed, criminology, it appears, may well have suffered from its attachment to sociology and the concomitant burden of investigatory parochial-

ism. Part of this situation springs from the value and reward system of sociology which places its topmost stress on methodological sophistication,* its lowest prestige on substantive investigation and humanistic disputation. Sociology, in addition, is considerably more concerned with causes than with consequences of behavior, and criminology has absorbed this particular bias, with not altogether desirable results.

The commitment to sociological values is clearly reflected in the latter-day attempts by criminologists to wiggle away from the criminal law as a basis of operation. Emphases are placed on deviant behavior, on parasitism, on social pathology. Consummate and disproportionate attention, as one writer has noted, is paid to elaborate discourse on the precise definition of crime (4, p. 5). Much of this situation arises from a failure to keep the functional separated from the procedural aspect of crime (48, p. 77). As Michael and Adler argued with great skill some time ago, "the most precise and least ambiguous definition of crime is that which defines it as behavior which is prohibited by the criminal code" and this is the "only possible definition of crime" (27, p. 2). From such a framework one of the most significant aspects of criminology becomes the investigation of behavior which is mediated by what Tappan calls the "axiomatic" proposition that "the norms of criminal law and its sanctions do exert some measure of effective control over human behavior" (44, p. 101). These statements underline the fact that *both* the behavior and the law are of vital importance.

Much of the attempt to escape from a legally-rooted concept of crime, apart from a wholesome endeavor to redefine behaviorally homogeneous criminal groups (10), appears to stem from the fact that sociologists are not interested, because of disciplinary values, in dealing with the diffuse and complicated criminal law system, a system which they neither created nor can control, and therefore prefer to ignore. It introduces considerable complication for an action theorist, for instance, when crime becomes, as Carrarra noted, "not action . . . but infraction" (35, p. 12). The result is not dissimilar to a form of tyranny exerted by the IBM machine: the problem to be investigated becomes tailored to the talents of the machine, rather than to what might be regarded as more desirable considerations. So, too, it seems, the criminologist often selects for investigation those aspects of criminology tailored to sociology and by-passes other (and often more important) matters which do not fall within the sociological compound.

Conclusion

In conclusion, then, it may be noted that both sociology and law, despite recurrent flirtations, have been beset by some basic conflicts which often grow out of deep-seated commitments to diverse viewpoints, as well as out of more mundane items such as the status of the practitioners. Cross-fertilization between sociology and law, in either direction, has been comparatively limited. In criminology, the field of study examined most closely, it is felt that an a priori commitment to sociological values has produced significant insights but, particularly

*Note Mills' recent criticism that, lacking really interesting work, sociologists indulge in abstract discussions of 'methodology,' a word Mills despises. One achieves method, Mills says, by asking and answering important questions and by paying close attention to the words one is using, "especially their degree of generality and their logical relations" (28). Schur has observed, further, that "exaggerated stress on methodological precision, and ascetic efforts at ethical neutrality, may all tend to support an outlook stressing individual, rather than social, pathology (38).

during recent years, has also led to intellectual roadblocks. Justice Felix Frankfurter gave judicial expression to an academic truism, often neglected, when he wrote in *Sweezy v. New Hampshire:*

> The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology, and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities (43).

In this respect, the present paper would stress the conclusion of a recent UNESCO report which noted that the study of criminology is "essentially a multi-disciplinary affair" and that such study "should not be attached to a single discipline" (9, p. 48). Without realignments which would make the UNESCO recommendation a reality, it should be underscored further that criminologists require a particular dedication to open-minded concern with multitudinous matters and, in particular, have a singular need to take a deeper interest in legal material.

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FEDERAL LAW AND DRUG ADDICTION

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The popular sovereign remedy for all crime problems is increased penalties. In recent years this is nowhere better illustrated than in the case of narcotic laws in the United States. Although Federal anti-drug laws are said to be revenue measures, the penalties for violations at present include the possiblity of a death sentence. The average sentence of the Federal offender against these statutes has increased by more than 300 per cent within the last decade, and with the denial of probation and parole many narcotic violators are now being punished more severely than the average murderer. While students of crime and penology generally deplore this popular demand for severity, it should often be regarded as a symptom of a bad law in an advanced stage of deterioration and as the prelude to basic reform. The anti-narcotic laws fall into the category of bad laws because they are basically unjust, inconsistent and irrational.

This paper is an attempt to sketch some of the basic irrationalities and deficiencies in the attitude of the Federal law toward addiction which probably account for its failure to deal effectively with addiction. Since the author is a sociologist who knows less about the law than about addiction, many of the statements made in this paper should be regarded less as definitive assertions than as questions, or as illustrations of the kinds of problems which arise in the mind of a legal layman who observes what is done with drug addicts in the courts.

The basic anti-narcotic statute in the United States is the Harrison Act of 1914 (5). It was passed as a revenue measure and made absolutely no direct mention of addicts or addiction. Its ostensible purpose appeared to be simply to make the entire process of drug distribution within a country a matter of record. The nominal excise tax, the requirement that special forms be used when drugs were transferred, and the requirement that persons and firms handling drugs register and pay fees, all seemed designed to accomplish this purpose. There is no indication of a legislative intention to deny addicts access to legal drugs or to interfere in any way with medical practices in this area. Thus, the Act provided that,

> Nothing contained in this chapter shall apply to the dispensing or distribution of any of the drugs . . . to a patient by a physician, dentist, or veterinary surgeon registered . . . in the course of his professional practice only.*

This exemption for the doctor-patient relationship became a bone of contention when the Act began to be enforced, for nowhere in the statute or anywhere else was there a definition of what constituted legitimate "professional practice" with respect to addicts.

The Early Interpretation of the Harrison Act

The passing of the Harrison Act in 1914 thus left the status of the addict almost completely indeterminate. The Act did not make addiction illegal and it neither authorized nor forbade doctors to prescribe drugs regularly for addicts. All that it clearly and unequivocally did require was that whatever drugs addicts obtained were to be secured from physicians registered under the Act and that the fact of securing drugs be made a matter of record. While some drug users had obtained supplies from physicians prior to 1914, it was not necessary for them to do so since drugs were avail-

*See sections 1 and 2 of the Act reproduced in (15, pp. 983-984), or (5).

able for purchase in pharmacies and even from mail order houses.

In 1915 a Supreme Court decision in the *U. S. v. Jin Fuey Moy* case (19) took the first important step which ultimately led to the outlawing of the addict when it ruled that possession of smuggled drugs by an addict was a violation of the law. The defense had contended that the section of the Harrison Act, which specifically stated that the possession of drugs by unregistered persons was to create a presumption of guilt, referred only to persons required to register and not to all persons. It was argued that making possession of illegal drugs a crime for anyone had the effect of creating an entire class of criminals with a stroke of the pen. A similar doctrine during the prohibition era would have meant that any person with a glass or a bottle of liquor would have been subject to a prison sentence if he were unable to prove that it was not bootleg liquor. This decision had the effect of forcing the addict to go to the doctor as the only source of legal drugs left to him. This remaining source was shortly eliminated by further court decisions in the doctor cases.

The early Supreme Court rulings concerning the doctor's relationships to addicts were based upon cases involving physicians who had prescribed large quantities of drugs to many addicts in an indiscriminate manner. The Jin Fuey Moy (8), Webb (20), and Behrman (17) cases were decisive ones of such a nature. In the Webb case the court ruled that a prescription of drugs for an addict ". . . not in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use . . ." was not a prescription within the meaning of the law and was not included within the exemption for the doctor-patient situation. The Supreme Court, in reaching this decision, apparently did not bother to consult medical opinion on the matter, for it said that the contrary interpretation "would be so plain a perversion of meaning that no discussion is required." In a later case (8) the Court ruled that a doctor could not legitimately prescribe drugs "to cater to the appetite or satisfy the craving of one addicted to the use of the drug." Treasury Department regulations still use the Webb case language when they instruct the physician that he may not provide narcotics for a user "to keep him comfortable by maintaining his customary use. . . ."*

The Behrman Case in 1922 gave further support to the idea that it was not legitimate for a physician to prescribe drugs for an addict, for in it the court ruled that such prescriptions were illegal regardless of the purpose the doctor may have had. The decision in this case seemed to deprive physicians of the defense that they had acted in good faith, for Dr. Behrman was convicted despite the fact that the prosecution stipulated that he had prescribed drugs in order to treat and cure addicts.

After the Behrman Case the legal position of the addict seemed quite clear. He was simply denied all access to legal drugs. The rulings by the Supreme Court seemed to be moving toward the idea that the physician could not legally prescribe drugs to relieve the addict's withdrawal distress or to maintain his habit, but could only provide drugs to an addict undergoing institutional withdrawal and then only in diminishing doses. However, criticism of the law from

*See (12), a pamphlet issued by the Bureau of Narcotics in 1938, and in current circulation.

medical sources may have shaken the Court's confidence, for even before the Lindner decision (11) in 1924, a note of doubt crept into some decisions. For example, in the Behrman Case, in which vast quantities of drugs had been prescribed, the Court suggested that a single dose or even a number of doses might not bring a physician within the penalties of the law.

The Supreme Court decisions up to 1922 made it impossible for doctors to treat addicts in any way acceptable to law enforcement officials. The ambulatory method of treatment had been condemned, and since addicts were not accepted in hospitals, the doctor's right to administer diminishing doses during an institutional cure was mainly theoretical. The danger of arrest and prosecution was clearly recognized after 1919 when the first of the important doctor cases had been decided by the Supreme Court. Most doctors simply stopped having anything to do with addicts and the few who did not do this found themselves threatened with prosecution. The illicit traffic burgeoned during these years as addicts who had formerly obtained legal supplies turned to it in increasing numbers.

If the legal situation created by court decisions on the doctor cases had been left as it was in 1922, the addict's legal status and his relationship to the medical profession would at least have been relatively clear. A definite rule prohibiting medical prescriptions for users except under extremely restricted circumstances seemed to be in the process of emerging from a series of court decisions which were reasonably unambiguous and consistent with each other. The Treasury Department, entrusted with the enforcement of the law because it was a tax measure, had drawn up regulations which were based upon these early decisions. These regulations instructed doctors as to when they might give drugs to addicts and when not to and advised them to consult the police for advice in doubtful cases. The whole theory implicit in them was that addiction is not a disease at all but a willful indulgence meriting punishment rather than medical treatment. Regular administration of drugs to addicts was declared to be legal only in the case of aged and infirm addicts in whom withdrawal might cause death and in the case of persons afflicted with such diseases as incurable cancer. Current regulations of the Federal Bureau of Narcotics are still substantially the same with respect to these points (9).

THE LINDNER CASE (11)

Unlike the doctors in the earlier cases, Dr. Lindner, a Seattle practitioner, provided only four tablets of drugs for one addict. The addict, a woman, came to his office in state of partial withdrawal and he provided her with drugs to be used at her discretion. She was an informer who reported the incident to the police and Dr. Lindner was prosecuted for criminal violation of the law. Judging from the previous court decisions and from the Treasury Department regulations in force at the time, Lindner should have been convicted, and he was. The lower court could hardly have reached any other decision, for Dr. Lindner had obviously given drugs to this user to relieve withdrawal distress and to maintain customary usage and there was no thought of cure.

Nevertheless, after prolonged litigation, which is said to have cost Dr. Lindner $30,000 and caused him to be without a medical license for two years, he was finally exonerated by the Supreme Court. In its opinion, a unanimous one, the Court discussed the earlier doctor cases of Doremus, Jin Fuey Moy, Webb, Balint and

Behrman. While it did not specifically repudiate the doctrines drawn from these cases concerning the doctor's right to prescribe for addicts, it did explain that these cases had involved flagrant abuse and that the decisions had to be considered in this context. Reiterating that the Harrison Law was a revenue measure, the Court added the following important statement:

> It (the Act) says nothing of "addicts" and does not undertake to prescribe methods for their medical treatment. They are diseased and proper subjects for such treatment, and we cannot possibly conclude that a physician acted improperly or unwisely or for other than medical purposes solely because he has dispensed to one of them, in the ordinary course and in good faith, four small tablets of morphine or cocaine for relief of conditions incident to addiction. What constitutes bona fide medical practice must be determined upon consideration of evidence and attending circumstances (11, p. 18).

Commenting upon the Webb Case, the interpretation of which it did not accept, the Court commented that the rule therein formulated

> must not be construed as forbiding every prescription for drugs, irrespective of quantity, when designed temporarily to alleviate an addict's pains, although it may have been issued in good faith and without design to defeat the revenues (11, p. 20).

Of the Behrman decision the Court similarly warned:

> The opinion cannot be accepted as authority for holding that a physician who acts bona fide and according to fair medical standards may never give an addict moderate amounts of drugs for self-administration in order to relieve conditions incident to addiction. Enforcement of the tax demands no such drastic rule, and if the Act had such scope it would certainly encounter grave constitutional difficulties (11, p. 22).

The two new elements in this decision are (a) the Court's explicit espousal of the view that addiction is a disease and (b) the rule that a physician acting in good faith and according to fair medical standards may give an addict moderate amounts of drugs to relieve withdrawal distress without necessarily violating the law.

This opinion, which is still the controlling doctrine of the Federal Courts, seems to make nonsense of what had gone before, for it said that the addict who had been denied medical care by earlier decisions was a diseased person entitled to such care. More important still it clearly implies that the question of what constitutes proper medical care is a medical issue and therefore, presumably, one to be settled, not by legislators, judges, juries or policemen, but by the medical profession itself. Certainly the Federal courts in particular cannot legally tell doctors what to do with addicts if addiction is viewed as a disease.

The logical consequences which seem to follow from the acceptance of the Lindner opinion were spelled out as follows by Federal Judge Yankwich in 1936:

> I am satisfied therefore, that the Lindner case, and the cases which interpret it, lay down the rule definitely that the statute does not say what drugs a physician may prescribe to an addict. Nor does it say the quantity which a physician may or may not prescribe. Nor does it regulate the frequency of prescription. Any attempt to so interpret the statute, by an administrative interpretation, whether that administrative interpretation be oral, in writing, or by an officer or by a regulation of the department, would be not only contrary to the law, but would also make the law unconstitutional as being clearly a regulation of the practice of medicine (16, p. 553).

The references to administrative interpretation and regulation in this statement refer to Treasury Department regulations already referred to, which do in fact instruct physicians as to when they may and may not prescribe drugs for addicts. If this opinion is correct, the conclusion is inescapable that the present punitive system of dealing with addicts and the

Treasury Department regulations on which it is based are in direct violation of Federal law and based upon an unconstitutional interpretation of the Harrison Act.

If the Lindner Case dictum that addiction is a disease had been taken literally, a rational procedure which might have been adopted is suggested by what was done in Britain when the same disagreement arose between enforcement authorities and British physicians concerning the physician's right to prescribe regularly for addicts.* The Government was asked to set up a committee of medical men to investigate the question. The Rolleston Committee was the result. After extensive hearings in which this committee listened especially to the testimony of medical men with special knowledge and experience of the subject, the committee reported that doctors might prescribe drugs regularly for addicts and specified the conditions under which this might be done and the precautions which should be observed. This report, published in 1926, then became the official interpretation of the Dangerous Drug Laws of 1920 which were very much like the Harrison Act in all respects except that they were not called tax measures.

No similar appeal to the medical profession was made in the United States where the courts themselves have tried to formulate the relevant rules. The only recourse to medical advice has been through the use of expert testimony in the usual pattern, with prosecution experts supporting the prosecution's view, defense experts opposing them, and the jury choosing between the conflicting views. This makes a jury of laymen the arbiters of a technical medical dispute and in practice means that the courts intervene in a medical controversy on the side of the faction which supports the Government's enforcement program.

*See (10).

OTHER INTERPRETATIONS OF THE LINDNER CASE

As far as enforcement policies are concerned, the Lindner Case has had practically no effect and remains a ceremonial gesture of no practical significance for either addicts or physicians. Most assistant prosecutors acquiring trial experience in narcotics cases, and most police officers, probably do not know of its existence, for there is no reference to it in most of the literature issued by the Federal Bureau of Narcotics. The risk of arrest remains as before for physicians who attempt to treat addicts as diseased persons and addicts still find that the doors of the hospital and the doctor's office are closed to them.

There are a number of reasons for the impotence of the Lindner doctrine and prominent among them is the legal confusion in the subsequent cases. After the Lindner decision appeared in 1925, the Supreme Court has not had the opportunity to expand and clarify it by ruling on other similar cases. Reasons for this lack of opportunity are probably that few reputable physicians care to play Russian roulette with their careers by challenging existing enforcement practices, and secondly, that the Government probably avoids taking certain types of cases to the Supreme Court so as not to give that body a chance to expand and emphasize the precedent of the Lindner Case.

The lower Federal courts were no doubt reluctant to follow the logical implications of the Lindner Case, for this would have meant upsetting an established enforcement policy vigorously supported by police propaganda and to some extent by popular opinion and by part of the medical profession. In 1925 this policy had been in opera-

tion for a decade. Apathy in the medical and legal professions, based in large part upon the facts of the addict's low social status, his lack of funds, and that he is a difficult and troublesome person, contributed heavily to the reluctance to change the status quo.

A legal device favoring this conservative position was to interpret the rule of the Lindner Case as one which supplemented rather than replaced the older ones. Thus the Circuit Court of Appeals of the 10th Circuit in the *Strader v. United States* Case (14) reversed the conviction of a doctor and stated:

> The statute does not prescribe the diseases for which morphine may be supplied. Regulation 85 (of the Federal Bureau of Narcotics) issued under its provisions *forbids the giving of a prescription to an addict, or habitual user of narcotics, not in the course of professional treatment, but for the purpose of providing him with a sufficient quantity to keep him comfortable by maintaining his customary use. Neither the statute nor the regulations preclude a physician from giving an addict a moderate amount of drugs in order to relieve a condition incident to addiction* (withdrawal distress), if the physician acts in good faith and in accord with fair medical standards (14, p. 589).*

The italicized statements formulate two mutually incompatible rules. The first is that of the Webb Case; the second, that of Lindner. A doctor who provides an addict with drugs to relieve withdrawal distress necessarily also keeps him comfortable by maintaining customary use. No medical person acquainted with addiction would ever have been guilty of making this absurd statement which makes a distinction without a difference. Since both of these rules apply simultaneously to the reputable physician who treats an addict, there is no way of knowing whether he should be convicted under the first or exonerated under the second.

Without analyzing in detail other specific post-Lindner cases, the following general points may be made concerning them and their implications: (1) the Courts have not relinquished their right to rule on the good faith of the physician or to submit this question to the jury, and since no definite rules defining good faith have ever been formulated, the physician can only discover whether he acted legitimately *after* a criminal trial; (2) a physician's sincere conviction that the oath of his profession and his ethical duty to relieve human suffering and to give first importance to the welfare of his patient obligate him to provide addicts with drugs, has not been an effective legal defense; (3) physicians of admitted integrity and sound professional reputation have continued to be arrested, indicted and convicted; (4) medical experts of national reputation in the field of addiction whose opinions of the proper treatment of addicts would ordinarily be regarded as of decisive significance in defining legitimate medical practice have been indicted, tried and convicted for acting in accordance with their beliefs; (5) the Federal Courts have done next to nothing to restrict their jurisdiction in narcotic cases in a manner consistent with their own doctrine that addiction is a disease.

In connection with point (4), two additional cases should be mentioned, those of *United States v. Anthony* (16) and *Carey v. United States* (3). These two cases involved three physicians, Carey, Williams, and Anthony, who were asked by the City of Los Angeles, at the behest of the Los Angeles Medical Association, to take over the treatment of addicts who were former patients in that City's narcotics clinic. All were convicted in

*Italics added. See also the much later case of *U.S. v. Brandenberg* (18).

Federal Court for violations of the narcotic laws. The conviction of Anthony was reversed in an appeals court, but the appeals of Carey and Williams were rejected on technical grounds and their convictions stand.* Of the three, E. H. Williams was a prominent author included in *Who's Who,* a former associate editor of the *Encyclopaedia Britannica,* and a nationally known expert on narcotic addiction whose writings are still read and respected. The conviction of Williams epitomizes the inconsistency of the legal attitudes in this field, and underlines the risks which lesser figures in the medical field assume when they attempt to treat addiction as a disease.

The irony involved in the conviction of E. H. Williams is emphasized by the fact that in his trial, the stool pigeon who testified in court against him admitted that he was under the influence of drugs supplied to him by Government agents and that he had previously been so supplied. In most of the other doctor cases, drug using stool pigeons were also used, as the records indicate. The courts have deplored this practice but have tolerated it as a necessary expedient in law enforcement, thus sanctioning the provision of drugs by addicts by the police while denying the same right to physicians.

THE NARCOTIC BUREAU'S VIEW OF THE LINDNER CASE

That the Lindner Case is an embarrassment to the Federal Bureau of Narcotics is strongly suggested by the consistent failure of this Bureau to call attention to it. In a recent publication, the Bureau disputes the usual interpretations and argues that the Lindner decision is explained by a defect in the indictment which did not allege that Dr. Lindner acted in an unprofessional manner:

> It seems, therefore, that the substance of the holding was that, in the absence of an averment in the indictment that the sale was not in the course of professional practice only, the Court could not find as a matter of law that the sale of the tablets by Dr. Lindner "necessarily transcended" the limits of professional practice.
>
> We submit that the Lindner case did not lay down the rule that a doctor acting in good faith and guided by proper standards of medical practice may give an addict moderate amounts of drugs in order to relieve conditions incident to addiction. What the Court stated in the Lindner case was that the opinion (in the Behrman Case) "cannot be accepted as authority for holding that a physician, who acts bona fide and according to fair medical standards, may never give an addict moderate amounts of drugs for self-administration in order to relieve conditions incident to addiction." This is not an affirmative declaration that a physician may continue to dispense narcotic drugs to an addict to gratify addiction (4, p. 160).

The Bureau then goes on to call attention to the fact that many doctors have been convicted subsequent to the Lindner Case for supplying drugs to addicts and that in at least ten instances these convictions were upheld by United States Courts of Appeals.

The Bureau in this statement, which is one of the exceedingly rare occasions in which it takes any note whatever of the Lindner Case, makes no mention of the doctrine of the Federal Courts that addiction is a disease. Regardless of the merits of the Bureau's position from a legal or a logical point of view, it is this interpretation upon which its regulations are based and it is these regulations,

*This case is angrily and extensively commented upon by H. S. Williams, brother of the defendant Williams, in (21; 22). Another prominent medical authority on addiction, Dr. E. S. Bishop, was indicted in 1920. Both Williams and Bishop were critics of the Government's enforcement program and it is suspected by some that they may have been prosecuted for that reason.

rather than the decisions of the courts or the statutes themselves, which directly guide enforcement policy. The Bureau's interpretation clearly leaves the determination of legitimate medical handling of addicts within the police domain and justifies, however shaky the reasoning may seem, the continued prosecution of physicians whether reputable or not.

Official Inconsistency

As already pointed out, while the courts and enforcement officials have shown zealous concern in preventing doctors from keeping drug users "comfortable," the police have been permitted to keep drug using stool pigeons comfortable while working for the Government. More than that, the police regularly use the withdrawal distress of the addict as a built-in third degree to force addicts to provide information and to act as stool pigeons. They withhold drugs as punishment and provide drugs as a reward in order to secure desired cooperation and testimony.

In addition to these practices of the police, it is of interest to note that Public Health Service officials at the Lexington institution sometimes provide regular supplies of drugs to addicts over a period of time preliminary to complete withdrawal.* This is recognized by experienced practitioners as a desirable practice because it permits the addict's health to be built up and it allows for a period of needed psychological preparation for the ordeal of withdrawal. Outside of an institution this practice has the added virtue of removing the user from the control of the underworld drug peddler. Nevertheless, current enforcement practices effectively deny the ordinary physician the right to do this.

Other Lexington practices have even more drastic implications. For example, in experimentation with human subjects in that institution to which users are presumably sent for cure, non-using inmates have on repeated occasions deliberately been given drugs to establish addiction.** This has been justified on the grounds that the subjects were volunteers and were addicts of long standing, implying that it is not a crime to provide an addict with drugs if that is what he wants and if he is an incurable addict anyway! If it is a crime to establish active addiction in a non-using person outside of Lexington it is difficult to understand how any conceivable legal authority could make it non-criminal in Lexington. The argument here is, not that the Lexington physicians should have less latitude, but that others should have more.

The Tax Theory

It is probably pointless to indicate that the theory that the narcotic laws are merely revenue measures rather than police measures strains the imagination and is not taken seriously. For example, on this theory the police officers who forcibly pumped out the contents of a drug peddler's stomach in the Rochin Case (13) were interested only in the infinitesimal unpaid tax on the drugs found in his stomach. While the courts invalidated this technique, they have more recently approved of a similar forcible search of a drug peddler's rectum on the grounds that probable cause existed for believing that a quantity of drugs was there concealed (2). The penalties provided for violators also clearly do not make sense as tax collection devices.

Apart from the many obvious absurdities of the tax law theory, this view may have contributed to the fact that the narcotic laws make no distinction in principle between the perpetrator of the crime and the victim of it. Under the tax theory it is pos-

*See the testimony of Dr. Himmelsboch in (6, p. 1481).

**See, for example, (7).

sible to argue that the addict aids and abets the peddlar in the evasion of the tax by buying and possessing illicit drugs. Under this theory the rational solution which would facilitate the collection of the tax would be to give the user access to legal drugs from registered physicians.

If the peddler's crime is regarded as something other than a tax matter, it must be conceded that the harm done by him is mainly upon the addict or the potential addict. This would seem to imply that the function of the law is to protect addicts from peddlers — an obvious absurdity. It is even possible to argue, since the relief of withdrawal distress is a medical function and a humanitarian service for the diseased addict whose life may be placed in jeopardy by repeated unattended withdrawals and whose health certainly is, that the peddler substitutes for the doctor and performs a quasi-medical function. Under current conditions the peddler is the only source from which the user can obtain relief from his suffering; without him the addict is forced to undergo withdrawal without medical attention, unless the police will give him relief in violation of law.

The reason for the lack of distinction in the statutes between addict and peddler again represents a sacrifice of principle for expediency. The original formulation in 1915 of the theory that mere possession of illicit drugs by an addict was an offense may well have reflected pressure from enforcement sources which have always complained of the difficulty involved in proving sale. The possession doctrine makes it easier to convict peddlers; it makes it even easier to convict addicts. Placing the victim of the peddler under the same penalties as those provided for peddlers serves another extremely vital enforcement function by providing the leverage to force addicts to cooperate with the police in trapping higher sources of supply. All of this makes sense from the enforcement viewpoint, but it does not make sense if the addict is viewed as a diseased person, for it subjects him to exploitation not only by peddlers but also by the police, and it causes him to be sent to jail or prison solely because he is addicted or because he refuses to become an informer.

In practice the injustice involved is enhanced by the relative ease with which addicts are apprehended and the great difficulty in apprehending important illicit traffickers. The head of the Federal Narcotics Bureau has propounded the remarkable suggestion that the incarceration of users is an effective line of attack upon the peddler:

> From the practical standpoint it is fundamental that a business, legal or illegal, would be bound to fail if deprived of customers, and the peddler of narcotic drugs is no exception. If the peddler were deprived of a market for his illegal wares, he would cease to exist. As long as the addict is at liberty to come and go, the peddler has a steady customer (1, p. 161).

CONCLUSIONS

It has been pointed out that the present system of dealing with addicts is irrational and inconsistent and that it was not established by legislative intention or by court decisions but rather by administrative action within the Treasury Department. Legal confusion as exemplified in court decisions and general indifference on the part of the legal and medical professions form an important part of the background which has permitted the early line which enforcement took to continue in the face of apparently adverse court decisions.

The inefficiency of the narcotic laws is indicated by the relatively enormous extent of the problem and by the

many evils which have come to be peculiarly associated with addiction in this country. This inefficiency probably arises from the basic inappropriateness and injustice of the laws as presently interpreted and enforced; more specifically, it arises from encroachments by police and courts upon the medical domain involving the extension of the criminal law beyond its reasonable limits. In the long run it is fortunate that the narcotic laws have been ineffective, for unjust and inappropriate laws ought to fail. Public hysteria and popular demands for severe penalties played little part in the establishment of current practices and should be considered as effects, rather than causes of the basic legal situation.

Present confusion regarding the nature and purposes of anti-narcotic legislation is so great and so deeply imbedded in popular opinion and in the legal records that it is highly improbable that the situation can be corrected by future court decisions or by any measure short of repeal of the Harrison Act. As penalties have been progressively increased beyond the bounds of reason, as the addict has been progressively reduced in status and stripped of his rights until he has become an outlaw, and as the demand for even more severe penalties has continued, professional opinion has increasingly recognized these trends as symptoms of the need for basic reform. Opposition to the law has grown proportionately with the increase in the penalties. It seems reasonable to believe that legislatures will not for long be able to ignore this drift of opinion.

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JURORS' ASSESSMENT OF CRIMINAL RESPONSIBILITY

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This paper will report some qualitative impressions of jurors' assessments of criminal responsibility. The materials discussed here are part of a much larger study of jury decision making, the full results of which will be published in a series of separate volumes.* One of these volumes will deal with jurors' reactions to alternative legal criteria of responsibility in a sequence of experimental cases involving a plea of insanity. The present discussion will be limited to comments and impressions relevant to jurors' assessment of responsibility in the first of these jury experiments. The problem as we have approached it may be divided into three sections: the legal and historical background, the research design, and the data.

The belief that a criminal should be held responsible because he is capable of exercising choice is derived from a view of human nature which sees the individual as a rational being, socialized by the norms of society, and capable of controlling his own conduct. It rejects the deterministic view that an individual is controlled by psychic, divine, or social forces which render him helpless to abstain from antisocial behavior. The individual is seen not as the victim of his society, his environment, his class, or his God but as a true controller and engineer of his own destiny. As Dean Pound suggested: "Our traditional law thinks of the offender as a moral agent who, having before him the choice whether to do right or wrong, intentionally chooses to do wrong."**

This does not imply that criminal law fails totally to recognize the effects of environment — e.g., poverty, broken homes, etc. — on individual behavior. It does imply that the law does not believe that these environmental influences can totally overwhelm the individual. The law has traditionally taken into account exceptional circumstances or observed special categories. Neither infants nor persons acting under a form of coercion or compulsion nor the insane can be convicted of a crime, because they fail to fulfill the expectations of responsible human behavior.*** As Herbert Wechsler pointed out: "Responsibility criteria define a broad exception: the theory of this exception is that it is futile to threaten and condemn persons who through no fault of their own are wholly beyond the range of influence of threatened sanctions of this kind" (21, p. 367).

Thus, the nature of the penal law is derivable from the foregoiong view of human capacity. A person is liable to punishment if he commits a legally proscribed act because it is assumed that he is accountable as a competent person for voluntary conduct. The act of punishment, as has been observed by many students of law and society, expresses a formal condemnation, the aim of which is not only to punish and deter the offender but "to give concrete effect and publicity to the communities' standards of right

*Research on the jury system has been the concern of lawyers and social scientists at the University of Chicago Law School since 1953 under the general direction of Fred L. Strodtbeck. Materials already published include (20; 19; 11; 12).

**Cited in (6, p. 109).

***There is a substantial legal literature concerned with criminal responsibility as it is related to a plea of insanity. A partial bibliography on this subject includes (2; 5; 8; 10; 14; 15; 16; 17; 22; 24).

and wrong" (9, p. 272). Thus the act of punishment serves to impress upon the law-abiding public the fact that persons who commit legal transgressions do not go unnoticed or unpunished. When the society is remiss and the offender is allowed to go unpunished, this may have latent disfunctional consequences for the system. The law-abiding public may feel that it is not being suitably rewarded for its own conforming behavior. In a later section of the paper we shall note the uneasy manner in which jurors talk about persons they knew who received "Section 8" discharges from the armed services and yet who seemed to adjust with no difficulty to civilian life.

In most legal controversies over jury instructions, in criminal as well as civil cases, the elements encountered usually have had three dimensions: the communication of instructions to a jury so as to assure optimal understanding; the delineation of the scope of testimony or the admissibility of evidence; and the determination of the intrinsic meaning of the principle. Interestingly enough, the controversy around the insanity instructions has never been seriously concerned with the first two aspects of the problem but has been wholly centered on the third. Thus the issue has never been *how* to communicate instructions; it has been what should the instructions mean; where should the boundaries of responsibility be fixed.*

The rule of law applicable to a plea of insanity which has been in effect in the United States since 1851 is the M'Naghten rule, which provides that

> To establish a defense on the grounds of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and the quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong (13).

Thus, the "right from wrong" criterion restates the premise that the offender is a rational being capable of voluntary conduct, of distinguishing right from wrong; capable, that is, unless he is suffering from a disease which incapacitates his cognitive faculties.

Almost from the moment of its adoption** the M'Naghten rule has been the object of considerable criticism. In recent years the critics of the rule have intensified their attacks and have specified the following points as its major sources of weakness. The M'Naghten formulation fails to take into account the importance of noncognitive processes in human behavior and restricts the scope of expert testimony. They argue that, as the rule is currently interpreted, it does not permit the psychiatrist to testify on matters in which considerable knowledge has been gained since the M'Naghten decision was handed down in 1843. Despite the criticisms, however, there was no break in the uniform acceptance of the rule in the United States*** until very recently.

Some jurisdictions have included with the M'Naghten rule an additional and still older rule for assessing responsibility. But the rule, known as

*The recent opinions of Circuit Judges David L. Bazelon and E. Barrett Prettyman of the U. S. Court of Appeals for the District of Columbia aptly illustrate the felt need on the part of the bench at least for further elucidation of the principles involved in the determination of responsibility. See (23; 3).

**The judges sitting on the case establishing the M'Naghten rule in England in 1843 were accused by Queen Victoria of participating in a miscarriage of justice, and by the newspapers of the day as being "soft-headed."

***In New Hampshire in 1869, another criterion was introduced in (18). This rule, however, was neither adopted elsewhere nor tested extensively in the state of New Hampshire.

the "irresistible impulse" standard, is not applied anywhere in the United States as the sole criterion of responsibility.* There are those who believe it has little applicability, either because its doctrine is already included within the M'Naghten formula, or because, like the M'Naghten rule, it emphasizes only a limited aspect of personality. The basic criticism is that the notion of an irresistible impulse is unintelligible as a criterion for distinguishing the normal from the abnormal offender.

In 1954, the Circuit Court of the District of Columbia, in an opinion by Judge Bazelon, provided a dramatic stimulus to the controversy by introducing still another criterion for assessing responsibility in cases involving a plea of insanity. This new rule repudiated the traditional right-wrong and irresistible-impulse tests and adopted a criterion which was believed to be more in keeping with modern psychiatric knowledge. The Durham rule states:

> If from all the evidence in the case you believe beyond a reasonable doubt that the defendant committed the crime of which he is accused in manner and form as charged in the indictment, and if you believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. If you believe he was suffering from a mental disorder at the time he committed the act and the criminal act was a product of mental abnormality, you must find the accused not guilty by reason of insanity (4).

*At the present time the irresistible impulse is applicable as a supplement to the M'Naghten rule in seventeen states. The rule states: In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and he is not punishable for criminal acts.

The Durham rule has as yet not been adopted outside the District of Columbia. However, unlike the New Hampshire standard, which attracted little attention, the Durham rule has been reviewed many times in the brief period since its adoption in 1954.

Even those who have been critical of the M'Naghten rule because of its emphasis on cognition and have generally applauded the direction of the Durham standard are not completely satisfied with the rule as it is now formulated. They see in its wording ambiguities and vagueness so great as to impair seriously its application by a jury of laymen. Where, in the above phrasing, they ask, are jurors to find suitable guides for defining when an impairment is severe enough to confer immunity and for establishing the relationship between the impairment and the act? Those who are generally sympathetic to the M'Naghten formulation, although they agree that the phrase "to know" needs to be revised or more broadly interpreted, are critical of the Durham test because "it ignores cognition; it ignores the rational element of purposive conduct; it ignores the question that is crucial from the perspective of the law — whether the accused was competent to make the moral decision" (9, p. 288). Thus, whereas M'Naghten is criticized for overemphasizing the cognitive aspects of human behavior, Durham is criticized for underemphasizing those same aspects.

A year after Durham, in 1955, the American Law Institute proposed a rule which was to overcome some of the objections to both the right-wrong and product criteria in that it recog-

nized the importance of both volitional and cognitive faculties. At the same time, some attempt was made to define the degree of impairment necessary for conferring immunity. The suggested rule appears below:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.
>
> (2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct (1, p. 27).

Professor Jerome Hall, a distinguished scholar in the field of criminal law, has argued that any rule for judging criminal responsibility should meet the following standards (9, p. 288): such a rule must (1) be consistent with the view of a man as a rational being — that is, it must retain irrationality as a criterion of insanity; (2) be consistent with the concept of integration of the functions — i.e., that mental disease affects the whole personality of the actor including both the will and the emotions; (3) facilitate psychiatric testimony regarding volitional and emotional phases of personality; and (4) be stated in terms that are understandable by laymen.

Professor Hall, although generally sympathetic to the right-wrong principle, has made the following suggested revision in order to meet the objections of those who are concerned that the rule has failed to take into account the recent advances in psychiatry.

> A crime is not committed by anyone who because of mental disease, is unable to understand what he is doing and to control his conduct at the time he commits a harm forbidden by criminal law. In deciding this question with reference to the criminal conduct with which a defendant is charged, the trier of facts should decide (1) whether, because of mental disease, the defendant lacked the capacity to understand the physical nature and consequences of his conduct; and (2) whether, because of such disease, the defendant lacked the capacity to realize that it was morally wrong to commit the harm in question (9, p. 290).

In the discussions preceding both the American Law Institute and Hall formulations, there was general recognition of the importance of permitting the psychiatrists to testify in concepts that are familiar to them and that allow them "to think and talk as medical psychologists" (7, p. 329). In addition, both the American Law Institute and the Hall formulations recognize the need for revision of the old M'Naghten rule to include or elaborate the noncognitive — that is, the volitional and effective capacities — and to stress the integrative nature of human personality. There is also a recognition of the need for defining more explicitly than the Durham rule has done the degree of impairment and the relationship between the incapacity and the act.

The foregoing discussion has made some attempt to set the legal tone of the problem. Members of the bench and bar have shown that they are well aware of the difficulty of capturing a meaningful and, at the same time, functional principle of responsibility. The direction of their efforts is the increasingly sympathetic exploration of the underlying principles of human behavior, from which it is hoped that adequate criteria may be derived for assessing criminal responsibility.

It was shortly after the announcement of the Durham decision that the Jury Project at the Law School of the University of Chicago designed an experiment for studying "jurors' reactions to alternative definitions of legal insanity." The following steps are involved in the experimental procedure:

1. The experimental transcript is modeled after a real trial from which repetitious sections have

been condensed or deleted. The experimental trial is recorded, the parts of the attorneys and the principals in the case being read by members of the law school staff.

2. Regular jurors are used, drawn from the jury pools of metropolitan areas. The experiment is conducted in the court house.
3. Before the trial, each juror is asked to fill out a questionnaire which elicits much the same information as that acquired during an extensive *voir dire* or pre-trial examination.
4. The jurors then listen to a recorded trial.
5. After the trial, but before the deliberation, each juror is asked to state his own verdict.
6. The jurors then begin their deliberation. They are told at the outset that their deliberation is being recorded and that while their verdict can in no way effect the principles of the case, the judges of this court are interested in the result of the experiment for guidance in policy-making decisions.
7. After the deliberation, each juror is asked to fill out another questionnaire concerning his reactions to the trial and the deliberation.

The transcript used for this experiment was adapted from the case of *The People v. Monte Durham,* heard originally in the Circuit Court of the District of Columbia in 1954. The recorded trial, renamed *The People v. Martin Graham,* was played before twenty juries. The alternative instructions for guiding the deliberations were M'Naghten, "right from wrong," and Durham, "product of mental illness" with ten juries deliberating under each rule. Later ten of the twenty deliberations were transcribed and their content analyzed.* A brief summary of the trial appears below.

> At approximately 3 A.M. in the morning, the defendant, Martin Graham, was caught by the local police in the act of rummaging through the upstairs apartment of a house he had illegally entered. The police found him kneeling in the corner of the room holding a cap and T-shirt in his hand with about $50.00 worth of merchandise in his pockets. He offered no resistance to arrest.
>
> The defendant was charged with housebreaking. In his opening statement at the trial, the defense attorney maintained that the question of whether or not the defendant committed the act was not in dispute. The question was: was the defendant's mental state at the time of the offense such that he should be held responsible for his criminal act? Graham had a long history of mental illness and hospitalization. At the age of seventeen he was discharged from the Navy after a psychiatric examination had shown that he suffered "from a profound personality disorder which renders him unfit for naval service." A few years later he attempted suicide and was taken to a hospital for observation, where he was diagnosed as suffering from "psychosis with psychopathic personality." Graham's last internment in a mental hospital occurred four months before he committed the crime for which he is now standing trial. At the time of this last internment the diagnosis was "without mental disorder, psychopathic personality" and he was discharged two months later.
>
> During the trial the defense called two psychiatrists to testify concerning Graham's mental condition. One of the psychiatrists was familiar with Graham's mental history over a seven-year period; the other since his indictment. Both doctors testified that in their opinion the defendant was of unsound mind at the time of the crime. When asked to describe for the court the nature of the patient's mental state, Dr. Barton described Graham's condition in this manner:
>
> > The patient's condition has been diagnosed as reactive psychoneurosis, emo-

*These deliberations were selected so as to maintain the same proportion of "Guilty" and "Not Guilty by Insanity" verdicts that were obtained under the alternative forms for the full set of deliberations.

> tional immaturity, and a general psychopathic personality. The symptoms ordinarily associated with psychopathic personalities are irrational thinking, general unreliability, untruthfulness, insincerity, and lack of shame. Such patients usually exhibit poor judgment, although they have a superficial charm and good intelligence. They tend to engage in fantastic and uninviting behavior which may or may not be induced by alcohol. Their interpersonal relations are poor. They do things to get their own ends, and show little concern for the effect it may have on others. These people are frequently liars and their demands on others are usually excessive.
>
> The defendant and the defendant's father and mother were called to testify. Except for brief periods of lucidity, Graham's testimony was incoherent. He was unable to account for his activities during the periods when he was not in a mental hospital; he did not remember where he lived; and he answered one question by saying: "People get all mixed up in machines." Graham's parents testified that their son was a model child until the age of thirteen, when he suddenly became ill with rheumatic fever. From that time on he had difficulty in school, paid no attention to his parents' attempts at discipline, and would wander off, sometimes for days, without informing his parents of his whereabouts.
>
> Throughout the trial the prosecutor directed his arguments toward two points: (1) This case is a simple criminal action. The evidence presented incontrovertibly proves that the defendant broke into the "Harris home on Aspen Street" and was arrested in the act of burglary. The defense has made no effort to rebut these facts. (2) The defendant is feigning mental illness in order to escape responsibility for his crime. He has learned to depend on mental illness to extricate himself from difficult situations, be they at home, in military service, or when he is facing criminal charges. Martin Graham should be found guilty as charged.

The content of the ten deliberations will be the concern of the remainder of this paper.* The discussion of jurors' views of criminal responsibility can be divided into the following questions: (1) How is sane behavior differentiated from insane behavior? (2) How is the testimony of the expert witness evaluated? (3) How are the instructions interpreted? Concerning questions 1 and 2, it is possible to lump together the deliberations from both instruction versions because, in fact, the jurors' discussion of these problems is the same under both versions. For the third question, the discussion obviously will be different and will be treated individually.

In making the differentiation between sane and insane behavior, the most frequent argument supporting the defendant's insanity referred to the nature of the items he was attempting to steal. The fact that they were small and of little value indicated that he was not robbing for profit — i.e., there was no rational purpose behind his behavior. As one juror said:

> Look at it this way. If you were going to go out and break into someone's house, would you take the chance of breaking into somebody's house and getting caught and spending a couple of years in jail just to steal a cigarette lighter or a pair of cuff-links?

The second most frequently cited fact indicating insanity was the defendant's position or behavior when caught by the police.

> The defendant was hiding in such a childish way, in a corner holding some-

*Obviously, what the jurors say in the deliberation is related to who the jurors are: their sex, age, socio-economic status, religious background, etc.; the individual vote before the deliberation began; the initial alignment in each jury; and many other factors. These problems, although they are certainly pertinent, will not be treated in this article but will be extensively discussed in a volume to appear at a later time. The jurors' discussion of responsibility was also obviously influenced by the nature of the case they heard; and it may well be that had they heard a murder or rape case involving a plea of insanity, the discussion would have emphasized quite different points.

> thing over his face like an ostrich. His failure to resist arrest by fighting or running away was not the behavior of the normal criminal, who would have been aware of his situation and the consequences of being caught.

These were two major points used by jurors who argued that the defendant was insane. In addition, there were those who cited the defendant's past history, indicating that he had been previously committed to a mental institution, and that during one commitment he had received shock treatments. The mention of of shock treatments was the decisive point in one jury for arriving at a verdict of not guilty by reason of insanity, because it was argued: "shock treatments are given only as a last resort to people who are very ill mentally." The defendant's apparent "low mentality" was inferred by the slowness and dazed quality of his speech. There were brief comments by a few jurors that one could not consider the commission of any crime without immediately raising doubts as to the defendant's sanity.

Surprisingly, jurors who argued in favor of finding the defendant sane emphasized essentially the same facts as the NGI jurors:* the defendant's behavior at the scene of the crime and the items he attempted to steal. The fact that he committed a crime against property rather than person indicated sanity. The implication is that when the insane commit antisocial acts, they commit acts of violence and not those in which personal gain might be a factor. In this case, not only did the defendant commit a crime for which personal gain might be a factor but he carried it out in a typically criminal fashion. Parenthetically, it might be noted that the jurors in this case used as their standard the "reasonable criminal." This is an interesting transformation of the model — used by economists, lawyers, or jurors on a negligence case — of the "reasonable" or "rational" man. As one juror observed:

> If in broad daylight, with people watching him, he had thrown a brick through the window and then tried to enter the house, that would have indicated insanity (i.e., uncontrollable, compulsive behavior). But here we have a case in which the defendant broke into an empty house in the middle of the night by fiddling with the lock.

These actions indicated the defendant's ability to plan and carry out purposive behavior — i.e., "he must have been watching the house for some time and knew that it would be unoccupied."

> When he entered, he did so quietly and at a time when any ordinary burglar would think it safe to break in. Once he was in the house, he didn't turn on any lights, which again is normal for a burglar; and he was selective in the articles he stole; that is, he took small pieces that were easy to carry and negotiable.

Later, when confronted by the police, the defendant acted like a "normal criminal." "Hiding, cowering, playing dumb when you know you're caught is what they all do." In addition, the fact that he was hiding indicated shame, and "if you're ashamed, it means that you are aware that you have done wrong." With this interpretation of the defendant's action at the scene of the crime, the guilty-prone jurors had little difficulty in placing reports of his previous behavior in context. The defendant had consistently and effectively used insanity to gain the things he wanted and could not achieve any other way. When he wanted to be released from the Army and later from the Navy, "he began acting queerly."** When

*NGI refers to jurors who believe the defendant should be found not guilty by reason of insanity.

**References to the defendant's period in the armed forces, it might be noted, always stimulated a story about someone he

the defendant did not receive the affection and attention he demanded from his mother, he threatened suicide. When he wanted to gain release from an institution, "he knew how to act." The guilty-prone jurors saw these actions as consistent instances of malingering behavior.

The striking point about the discussion is the general agreement between NGI and Guilty jurors concerning the crucial facts in the case. For both groups the important points are the details of the crime: the defendant's motive for entering the house, his manner of entry, his behavior when confronted by the police, and the items he attempted to steal. They agree on what the crucial acts are but disagree on their significance as criteria for determining responsibility. The jurors' emphasis on events at the scene of the crime may provide a serious obstacle to their use of expert testimony, since the experts were more concerned with explaining the causes for the defendant's behavior than in discussing his actual behavior at the scene of the crime.

During the trial, jurors heard the testimony of two psychiatrists. Both were called by the defense and both testified, in some detail, that the defendant had a long history of mental disorder and in their opinion was mentally unsound at the time of the crime. In response to the question of whether the defendant could distinguish right from wrong at the time of the crime, the first doctor stated:

> If the question of right and wrong were propounded to him, he could give the right answer.

At this point the court interrupted:

> No. I don't think that is the question, Doctor; not whether or not he could give the right answer to a question, but whether he himself knew the difference between right and wrong in connection with governing his own actions. If you are unable to answer, why you can say so; I mean if you are unable to form an opinion.

To this the witness responded:

> I can't tell how much the abnormal thinking and the abnormal delusions of persecution had to do with his antisocial behavior. I don't know how anyone can answer that question categorically, except as one's experience leads him to know that most mental cases can give you a categorical answer of right and wrong. But what influence these symptoms have on abnormal or antisocial behavior —

The court interrupted and stated:

> Well, your answer is that you are unable to form an opinion, is that it?

To which the witness replied:

> I would say that that is essentially true for the reasons I have given.

In the "Durham," or "product," version, the following testimony was given.

> "Doctor, directing your attention specifically to July 3, 1953, will you give your opinion as to the mental condition of the patient at the time?"
> *Witness:* "It would be my opinion that Graham was suffering from a diseased mental condition at the time he was found housebreaking."
>
> *Attorney:* "And now, Doctor, would you say that the crime was the product of such a diseased mental condition?"
> *Witness:* "Well, I can definitely say this: the diseased mental condition did affect Graham's capacity to control his conduct."

There is little doubt that the jurors paid careful attention to the testimony of the two experts. In each of the deliberations, references were made to the testimony and strong opinions were expressed concerning it. With few exceptions, all jurors, regardless of their individual verdicts, seemed to consider their own views on the mental state of the defendant as more moderate than that of the prosecuting

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knew, on the part of at least one of the male jurors. There was always "a guy who was released on a Section 8, or shipped back to the States and later told his buddies how he had planned it all." These stories were usually told by jurors urging a guilty verdict.

attorney but less extreme than that of the two psychiatrists. For example, this is a statement by a NGI juror:

> I think we can all agree that insanity has been abused a lot. But here, this boy has a past record, we've got a record of a man who over a period of years has had that psychotic tendency; he's definitely a mental case. It isn't something that a man would come up to you and say, "Well I was insane," and then he'd get out of the institution, and then he'd say, "Well I'm sane now." Of course people do get disgusted with that type of stuff. But here, I think it's pretty clear that this man had a mental condition over a period of years. Since we're not psychiatrists ourselves, we'll just have to use our own judgments of whether he was sane at the time he committed this burglary. In absence of the prosecution absolutely showing that this man was sane, I think we've got to go along with the psychiatrists, that this man had a mental condition.

A juror who believed the defendant should be found guilty observed:

> The thing we are trying to do now is determine the defendant's sanity. On this sanity deal, the psychiatrists said they found a mental disorder. Well, I'm not too much on the psychological aspect of life, but I can say this. I don't think there is a person sitting in this room that if they were tried by a psychiatrist, with their background of education and their approach that they couldn't find some kind of quirk in all of us.

In the same vein another juror commented:

> As far as the psychiatric testimony, I would say that a psychiatrist could pick up any dozen people and make up some sort of examination, the type that they give you; and they'll find something wrong with you. They'll turn up some kind of nervous state. Why you or I could be in a bad condition while we're sitting here now.

On the other hand, the typical NGI response, exemplified by one juror, was:

> The doctor from the Municipal Hospital found him insane. He said he had mentally diseased, psychopathic tendencies with a psychosis. He also said that these people, though they are mentally unbalanced, a lot of the time they can be rational; they can give you a rational answer to a question that you ask them; that doesn't necessarily mean in itself they are not diseased.

✓ There were few jurors who believed that the testimony of the psychiatrists should determine the verdict. The best expression of this atypical position is the following:

> I don't know anything about this technically; but if a doctor said you had appendicitis, and you said no, I haven't got appendicitis, who would you believe? Now, it's true that you might go to another doctor, but if he said the same thing, who would you believe? Your own feelings that you just had a pain in your side, or the doctors', that you had appendicitis?

✓ The guilty-prone jurors found that aspect of the doctors' testimony which was directly relevant to the rule of law particularly helpful for defending their own position. The experts' inability to state explicitly the relevance of the rule to the defendant's behavior was commented upon in the following manner:

> You guys [jurors voting NGI] are disregarding the testimony of the two psychiatrists. Neither of the two doctors when asked specifically if the crime was caused because of the illness, neither doctor would admit that insanity prompted him to commit the crime.

Or, for those who heard the right-from-wrong version:

> The psychiatrist could not answer whether the defendant could tell right from wrong. He wouldn't commit himself on that one.

From the general tenor of the deliberations it may be concluded that the jurors neither wholeheartedly adopted the opinions of the medical experts as directives for their own behavior nor did they completely discount them. They did, however, clearly differentiate their own role in this procedure. Although the psychiatrists as experts may present their views for consideration, it is the jurors who are concerned with weighing the evidence, accepting or rejecting testimony, deciding on the meaningfulness of the

defendant's previous medical history, and assessing responsibility.

There was one point on which it appeared that all jurors were in agreement. There was something wrong with the defendant; he was "a little peculiar," "somewhat unbalanced," "slightly retarded"; the difference arose concerning the extent of his incapacity and its relationship to the legal criterion. The psychiatric evidence was accepted, at least to the extent of establishing opinions concerning the defendant's mental state. But the jurors' problem of reaching a decision which had legal implications still remained. In this sense the jurors' dilemma mirrors the controversy of the forensic experts. The jurors were not faced with the relatively easy problem of the "raving maniac" or the "drooling idiot"; they were required to explore that fuzzy area between the extremes of sanity and insanity. In that area they had to decide whether the extent of the mental incapacity and its relationship to the crime were sufficiently established to warrant a finding of not guilty on grounds of insanity.

Jurors who have been instructed under the M'Naghten rule discuss the application of the rule of law to the facts in the following manner:

> There is no doubt that the boy was mentally deficient; but the definition of sanity or insanity is whether he [the defendant] knew the difference between right and wrong. Whether he knew he was doing something wrong by his actions.
>
> * * *
>
> His [the defendant's] mind was retarded; but I wouldn't say he was or wasn't insane. It seems to me that he had the mind of a thirteen-year-old and if a child of thirteen committed a crime, he'd know right from wrong and he'd be punished in some way.
>
> * * *
>
> I think he is a little insane, but I think he knew the nature of the act, knew he was doing something wrong. The judge's instructions point out that even though the man may have had perverted notions, if he knew what he was doing at the time he committed the act, if he knew he was doing wrong, that's all we have to pass on. That's really our decision.

Many of the jurors urging a verdict of guilty gave to the instructions the narrowest interpretation. Under M'Naghten, the term "to know" was regarded as exclusively a matter of cognition. As one juror summed it up, "If the defendant doesn't know right from wrong, how is it that he knows what day of the month it is?" It was a rare instance when a broader interpretation, such as the one included below, was ventured:

> He [the defendant] knew what he was doing in the sense that he knew how to get into the house, where to find the bedroom, what articles he wanted to take, but, he still didn't know the full significance of what he was doing.

In juries deliberating under the Durham instructions, the term "product" was frequently given as limited and precise an interpretation as was the phrase "to know" in the M'Naghten formula. "Product" was believed to mean an exclusive and exhaustive result of mental disease.

> We don't want to leave the impression that the boy in this case doesn't need medical attention; but, we're trying to decide whether this robbery was the result of his mental condition.
>
> * * *
>
> He [the defendant] could be insane, but so long as the robbery is not the product of that insanity, then we have to find him guilty.
>
> * * *
>
> I agree he's mentally sick, but our problem is did he know what he was doing. In other words, was the crime caused by him being sick?

In one jury instructed under Durham, both criteria were operative, "product" and "right from wrong." The following comments made during the discussion aptly capture the con-

fusion concerning the two instructions.*

> Now, there's no doubt that the defendant had a defective mental condition; but, the law says if he knew he was doing wrong even though he was in a psychotic condition, he could be found guilty.
>
> * * *
>
> Everyone admits he's mentally abnormal; but did he know he was committing an act against society? That's the whole point.

Many of the jurors, in their interpretation of the Durham instructions, appeared to bypass one of its basic tenets. They did not ". . . view the total personality of the individual and his ability to function in society"; instead the jurors ". . . enumerate[d] particular symptoms of insanity in order to see if they add[ed] up to mental incapacity" (21, p. 373). As the quotations on page 64 indicate, they analyzed each of the defendant's actions at the scene of the crime and asked, "Is this a symptom of disease?" When the jurors found a particular action which might be deemed a symptom, they probed: could the behavior have any other meaning and what is the relationship between the behavior and the commission of the crime? For example: "While it is true that holding a T-shirt over one's face is silly and irrational, perhaps the defendant was one step ahead of the police." This act, then, was interpreted as a cunning maneuver for escaping responsibility.

Two points emerge from the discussion above. The first is that all jurors, those instructed under M'Naghten as well as those instructed under Durham, believed that cognition was the crucial factor in determining responsibility. The second point is that the Durham jurors appeared to have no more difficulty than the M'Naghten jurors in construing the instructions to suit their beliefs concerning the centrality of cognition.

Although replications may negate the conclusions, a study of these ten deliberations indicates that the fear expressed by some members of bench and bar that instructions are ignored or not given serious consideration in the jury room is not justified. However, the fear that jurors either out of ignorance or partisanship misinterpret portions of the instructions cannot be wholly dismissed. For example, one juror holding out for a guilty verdict argued:

> We're not here to reform this guy; we're here to punish him. [*Other:* We're not here to punish.] When he's punished, you put him in a jail, not in a hospital. Under normal conditions, if a man is guilty and he's been proved that way, he goes to jail. There's no talk about sending him to a hospital instead of a jail. We're here to enforce the laws of the city. [*Others:* No, we're not here to enforce the laws of the city, we're here to decide whether that boy is insane or not. We're here to do justice, we're not here to decide or enforce the law.] You don't solve a crime by putting him in the hospital; you're not supposed to do that.

When one juror asked him:

> Do you think you would be disqualified from serving on a jury later because a verdict of insanity is not legal? Do you believe in any case, a plea of insanity is legal, I mean that it has a place in our system of jurisprudence?

The juror was not directly responsive in his reply:

> You can say anything you want to, it's a free country. All I do is go by the instructions. There it says that the man was arrested for burglary by two policemen. You people want to cure or coddle him, all I want to do is punish him for that one little crime. And if the judge turned him loose because it's his first offense that would be all right. That's the law.

*A possible explanation for the confusion of instructions is that although the jurors had been instructed only under Durham, some members may have sat on another case in which a plea of insanity had been entered and the instructions given were "right from wrong." More probably the right-from-wrong criterion is so commonly cited a standard that it is everyday knowledge to jurors.

Returning to the three questions posed earlier: sane behavior is differentiated from insane behavior by the defendant's ability to act rationally and to commit legally proscribed acts in which personal gain might be a consideration. Although careful attention is paid to the expert testimony, the bases for the jurors' assessment of the defendant's mental state seem to derive primarily from their recounting of the details of his behavior at the scene of the crime and from piecing together what must have taken place before the police arr' l. The view that psychiatrists hav a certain investment in finding something wrong with everybody also appears to have rather wide acceptance. With the jurors' criterion of insanity so dependent on cognition, it is nc surprising that the discussions in the deliberations relevant to instructions are similar for both groups. The particular phrasing of the legal formulation does not appear to interfere with preconceived beliefs that the criminal who is insane cannot plan or carry out seemingly rational but legally proscribed acts.

Considerable progress has been made since the turn of the century in dealing more generously with persons who are insane. This progress is linked with the popular image and public understanding of the nature and manifestation of mental disease. The opportunity of conducting jury experiments in trials involving a plea of insanity provides a remarkably good way of polling public opinion when it is mobilized around a given problem.

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PROFESSIONAL ETHICS AMONG CRIMINAL LAWYERS*

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A profession is particularly appropriate for sociological investigation because it manifests a degree of closure from the remainder of society, its purpose is relatively specific, and because there are comparable groups to study within the same cultural area. It is consequently not surprising that the professions are being studied by contemporary sociologists.

What aspects of a profession are of interest to the sociologist? Among topics for investigation are the *careers* of its members, including the relationship between types of training, requirements for admission, paths to advancement and aspirations of participants. Under *organization* the researcher may consider types of membership, leadership, its authoritarian or democratic structure, and the system of rules. Regarding *relationship to society*, its authority and functions, quality of relation to clients, its control and encouragement by government, and its position vis-a-vis changing social conditions may be selected for study.**

The quality of professional orientation to a calling is the general framework for sociological analysis. This social behavior takes place in a particular kind of system of social relations and norms. The system exists in the public's expectations for conduct, and it is internalized by members of the profession. Its structure includes provision for general and specialized training, admission requirements and standards of competence, as well as norms regulating relations with other members, clients and the public.***

These characteristics of a profession may be thought of as a *constructed typology* in the sense that they logically define an extreme theoretical system as an absolute standard with which empirical reality may be compared. Knowing in advance that all professions deviate from the standard, no invidious comparison is intended by the analysis. Ultimate evaluation of deviations must refer to disciplines other than science; the function of social science is to explain deviations.

The Significance of Professional Ethics

Notwithstanding a tendency for lay definitions of a profession to emphasize the "learned" nature or special knowledge requirements of a profession, all of the occupations which have aspired to professional status have stressed the importance of *public service* or what is implicit in this term — an ethical code. The practice of law is no exception; in fact its rise from a low level of respectability in American society a century ago is closely associated with the Bar's commitment to such standards (8, Ch. VIII, IX). Although the enunciation of these professional norms comes largely from lawyers in academic positions and in the higher courts of the

*This report is part of a larger study of the criminal lawyer, "Survey of Criminal Law and Litigation," directed by the writer under the sponsorship of the Survey of the Legal Profession of the American Bar Association. The present article is a revision of paper given before the seminars on Sociology and the Law, Rutgers University School of Law, Spring, 1956.

**No attempt is made to exhaust possible subjects for investigation. For an outline of topics to be considered in analyzing a profession running to 63 mimeographed pages, see (6).

***In the "Introduction" to their monumental work A. M. Carr-Saunders and P. A. Wilson state they have no interest in drawing a line between professions and other vocations (3, p. 3). One cannot follow their analysis, however, without arriving at a fairly clear conception of what these authors consider a profession.

land — as is inevitable and desirable — by now the *Canons of Professional Ethics* of the American Bar Association (revised from their adoption at the Bar's first meeting in 1908) have been followed in the codes of about 25 state bar associations and more generally function as a "common law" basis for enforcement procedures in courts and grievance committees.*

It is hardly an accident of history that the leading professions have directed attention to the subject of ethics. Far from being a matter limited to self-interest and public relations or to unattainable ideals, an ethical code is a functional necessity to the very existence of a profession in contemporary society. This development is clearly related to the growing dependence of the layman on the expert's advice — the former's relative ignorance in regard to an increasing number of fields of rational knowledge in which he is incompetent to judge the quality of service. Not only the fact of the expert's superior knowledge, but the general rationalization of society to the point where the specialist is less often accepted on the authority of charisma than on expectations for practical results constitutes a social pressure for normative standards in professional conduct.

A second reason for professional ethics pertains to the governmental delegation of monopoly status to the practitioners that lends public protection from outside competition and allows for considerable self-regulation of recruitment and conduct standards. A third factor in this connection follows from the non-material nature of professional service and often its confidential character that lessen the effectiveness of a public or market evaluation of the "product." Finally, the fact that so much may be at stake — health, reputation, career or life-long savings — is a matter that requires assurance of integrity among those who practice in these areas.

With reference to the lawyer in particular, his normative obligations are to his client, the court, his colleagues and to the public at large. Conflicts of interest among those loyalties are potentially the rule rather than the exception in his roles as advocate, attorney or counselor, and his own self-interest is presumed to be secondary to any of these obligations. Public confidence in professional conduct is virtually required for the organization of these services.**

Despite the fact that the general character of the conflicts in interest are much the same for the criminal and civil law practices, it is widely held in the profession that the problems of ethics are qualitatively different. The former's clients, for instance, come largely from low socio-economic strata; fees from those accused of crime are difficult to collect and these clients are less trustworthy. Consequently, a retainer fee is more often demanded. The conflicts of interest in this field of practice are clear: the practitioner's desire for clients versus a taboo on solicitation; right to refuse a case versus obligation of Bar to provide service to all — even to those believed guilty of crime; the client's and his attorney's desire to win a case versus obligation of the latter to aid the court in support of "justice." These same dilemmas are nevertheless quite in evidence throughout the profession: solicitation, refusal of undesirable clients, and pressure to use questionable practices are hardly limited to the criminal field.

Design of Project

With a constructed typology of a

*For a selection of representative affirmations in regard to the importance of legal ethics, see (4, Ch. III).

**For an excellent summary of lawyers' obligations see (1, Ch. 2). See also (5).

profession as reference, the plan of this study was to investigate the practice of criminal law in a number of cities using questionnaire and interview techniques. During the summer of 1951 lawyers were interviewed in five different areas of the United States: three large metropolitan cities (one in the deep South and two on the Eastern seaboard) and two smaller cities (in New England and the Middle West). For purposes of research a criminal lawyer was defined as an attorney who devotes ten per cent or more of his practice to criminal law. In two of the larger cities a sample of over 40 per cent was randomly selected from lists of their total populations and virtually all criminal lawyers were included in the three other cities — making a total sample of 101 attorneys in criminal law. From the same cities random samples of civil lawyers (defined as all other practicing lawyers) were interviewed for purposes of comparison — a total of 104.

An interview schedule of some 50 questions, pretested in the field by the research staff and criticized by several legal consultants,* covered the social background characteristics of the respondent, career and nature of his legal practice, community and political activities, relations with clients, and attitudes toward the profession and some of its problems.** Each lawyer selected for interviewing received a letter describing the purpose of the study and its sponsorship and one from an officer of the local bar or judge of the county court, followed by a telephone request for an appointment.***

The method of analyzing the data is primarily statistical, and includes classification with straight enumeration of responses and a cross-classification of answers. An attempt has been made to avoid reporting mere random occurrences in the comparative analyses by using standard tests for statistical significance.**** For purposes of classification the following operational definitions have been used: *specialists* in criminal law have 40 per cent or more of their practice in this field; others are *general practitioners*. Also, lawyers with *low incomes* receive less than $10,000 and with *high* incomes receive $10,000 or more net income annually; *nongraduates of college* includes those with no undergraduate experience and those who went to college some years without graduating; and lawyers in the category of *minority religion* includes Catholics and Jews.

The empirical findings and their interpretations reported here relate to one topic of the project: professionalization as it concerns attitudes and activities regarding ethics — matters which constitute the *sine qua non* of professional behavior.

OPINIONS ON VIOLATIONS OF ETHICAL CODES

For the legal practitioner ethical norms are formally prescribed by the American Bar Association, state and

*Judge Alexander Holtzoff and Professor Sheldon Glueck were official consultants to the project. Professor Willard Hurst also made helpful suggestions for the design of the questionnaire. The research staff included David Caplovitz, Harold R. Katner, Sol Levine, Donald J. Newman and H. Carl Whitman. The author is indebted to these persons for their effort and insights, although the former must take the responsibility for the design of the project and its administration.

**A copy of the questionnaire is available upon request from the author.

***Each member of the research staff was largely responsible for interviewing in one of the five cities. Approximately five per cent of the original samples of lawyers were not interviewed. The interview took from one to three hours.

****The five per cent level of significance has been assumed. Chi square, used for this test of statistical significance, must be *at least* 3.84 in a 2 x 2 table, or 5.99 in a 2 x 3 table. "Correction for continuity" was used in all 2 x 2 tables.

local bar association, legislative statutes and court precedents. To discover the extent to which lawyers violate these regulations would be a difficult if not impossible task for there are problems of including and excluding conduct as unethical and of extensive investigations to determine the validity of accusations. Moreover, the extent of misconduct does not answer the question of its seriousness.

What is perhaps of greater significance, and at the same time easier to obtain by way of interview techniques, are the conceptions which lawyers themselves have of the standards maintained in the profession. While these conceptions are only a crude indication of the frequency of violations, they may have a bearing on the quality of professional morals in regard to these standards. Psychology has demonstrated the importance of one's self-conception in individual behavior; important also are the images of one's group. Conceptions of the standards of conduct are likely to bend the quality of the practitioner's behavior in the direction of these conceptions.

Most Common Unethical Practices. Attorneys in criminal law were asked, "Will you describe the most common unethical behavior you know of in the practice of criminal law?" Other attorneys responded to a similar query in regard to civil law. The answers are presented in Table 1.

Keeping in mind that the proportions in this table do not indicate the amount of unethical activity, it is perhaps significant that the responses of the two groups of lawyers parallel one another so closely and that over half of each group mention relatively serious matters of misconduct. Although "soliciting clients" may not be so considered, from 18 to 34 per cent of each group list "exploiting clients" and "suborning witnesses" as the "most common unethical behavior." The latter practices are serious in terms of the public interest, and civil lawyers mention a little more frequently "exploiting clients" than do criminal lawyers in regard to their respective field.

TABLE 1

OPINIONS ON THE MOST COMMON UNETHICAL BEHAVIOR IN THE PRACTICE OF CIVIL AND CRIMINAL LAW
(PERCENTAGES OF RESPONDENTS)*

Types of Unethical Behavior Mentioned Total respondents	Criminal Lawyers (99)	Civil Lawyers (97)
Can think of nothing: mentions only trivial matters	24%	23%
Soliciting clients	28	28
Exploiting clients	28	34
Suborning witnesses	23	18
Unethical re other attorneys	4	10
Activities re bondsmen	23	0
Other matters	15	8

*Percentages total more than 100 because some lawyers mention more than one type of unethical behavior (lawyers in first category are not included again).

Surprise on Entering Practice. A test of the norms maintained by a profession may be had from the experiences of those starting a practice. Law school tends to inculcate ideal norms. How far must these be compromised in adjusting to the realities of the practice? Hence the query: "Were you at all surprised, upon entrance in practice, at seeing how casually professional ethics are sometimes regarded by members of the legal profession?"

Appropriate probes distinguished those who were not surprised because there was little unethical behavior from the lawyers who felt they knew what to expect.

Replies to this question, in Table 2, indicate that those in the criminal field more often than lawyers in civil practice are struck by the extent of casual regard for unethical conduct they find when starting the practice of law; or ignoring this difference, approximately half of all lawyers are surprised. Respondents who give affirmative answers to this question were further asked, "What things particularly surprised you?" "Exploiting clients" was definitely the most common reply for both groups of lawyers: 33 per cent of the criminal lawyers and 24 per cent of the civil lawyers among those who admitted surprise.* A final probe for these attorneys was used: "How do you feel about such things today?" Here again criminal lawyers admit somewhat more frequently concern for the problem of ethical conduct (Table 3).

Conditions Leading to Unethical Conduct. To the social scientist, behavior is something to be explained. This includes normal, expected behavior and that which deviates from prescribed norms. The attitude that *conditions* of action do affect behavior and some awareness of these factors are probably important prerequisites to effective social control in such a

TABLE 2

REACTIONS TO ATTITUDES FOUND TOWARD MATTERS OF PROFESSIONAL ETHICS ON ENTERING PRACTICE
(PERCENTAGES OF RESPONDENTS)

Reactions Total respondents	Criminal Lawyers (98)	Civil Lawyers (101)
Surprise at casual regard for matters of ethics, or "I knew what to expect"	60%	44%
No surprise, unqualified	22	19
No surprise: "Lawyers not unethical," "Didn't see much of it," or resents implication of question	18	37
Total	100%	100%

Chi square is 8.51.

TABLE 3

"HOW DO YOU FEEL ABOUT UNETHICAL BEHAVIOR TODAY?"*
(PERCENTAGES OF RESPONDENTS)

Type of Response Total respondents	Criminal Lawyers (64)	Civil Lawyers (61)
Admits surprise or concern for amount of unethical behavior today	39%	31%
Denies surprise or concern for amount of unethical behavior today, but admits that some exists	36	28
Denies unethical behavior today; "Lawyers basically honest"	25	41
Total	100%	100%

*Not a statistically significant comparison.

*Total respondents here were only 52 and 37, respectively.

professional group. With this in mind, lawyers were further queried to discover their conceptions of the genesis of unethical behavior: "What is there in the set-up of the court system and the practice of criminal law which makes for whatever unethical behavior may exist?" Responses to this were also obtained from civil lawyers with the expectation that they might reflect a different point of view (Table 4). rather than the conditions of the practice as leading to misconduct. Civil lawyers, on the other hand, reverse these proportions to a slight extent by finding the difficulties in the practice of criminal law itself. In contrast with the number of attorneys who admit the existence of unethical conduct, the data of this table suggest that relatively few of them have seriously considered the reasons for it; many are

TABLE 4

OPINIONS ON CONDITIONS WHICH LEAD TO UNETHICAL BEHAVIOR (PERCENTAGES OF RESPONDENTS)

Opinions on Conditions Re:	Criminal Lawyers	Civil Lawyers
*Practice of Criminal Law**		
Total respondents**	(86)	(56)
"Can think of nothing," "human nature," etc.	64%	68%
Pressure of client; type of client	13	4
Fees uncertain, inadequate	8	0
Insufficient vigilance by bar	7	13
*Criminal Court****		
Total respondents**	(86)	(56)
"Can think of nothing," "human nature," etc.	50%	75%
Incompetent personnel	17	13
"Conviction psychology" of D. A.	8	0
Party politics	7	5
Activities of bondsmen	7	2

*Other conditions mentioned 1 to 3 times: excessive competition, contacts with police or D. A., inability to counsel client immediately, inadequate training or incompetence, and public officials in practice of law.

**Lawyers insistent that no unethical behavior exists, and in addition many *civil* lawyers of two cities, were not asked this question. Included in percentages are lawyers who mention more than one condition.

***Other conditions mentioned 1 to 4 times: corruption of personnel, variation in attitudes of judges toward prosecution, collaboration of judge and D. A., jury incompetence, and desire of police to convict.

Of course civil lawyers are less familiar with the practice of criminal law, and consequently more often disclaim any knowledge of these conditions. The most striking fact revealed by these figures is that from one-half to three-fourths of all respondents could think of nothing in particular regarding the practice or the criminal court which could help to explain unethical conduct. It may also be significant that criminal lawyers more often than other attorneys are prone to point out conditions of the criminal court apparently indifferent; or there is a tendency to project the blame onto others such as the type of client or the criminal court.

What Types of Lawyers Hold These Views? Of particular interest for a sociological analysis are the categories of lawyers who hold these conceptions in regard to unethical conduct. Consequently, the sample of criminal lawyers was divided into categories by degree of specialization, income, amount of college education, and religious

background. The most obvious conclusion here is that the attitudes classified in the foregoing tables are widely distributed among criminal lawyers such that there are few statistically significant differences between categories of lawyers, although significant distinctions would no doubt emerge should larger samples be available. Some tentative conclusions can be reported.

Comparing criminal lawyers who did not graduate from college with those who obtained a college degree, there are a number of consistent findings. Thus, the nongraduates mention more unethical practices per respondent and more frequently refer to the serious matter of subornation of witnesses; they more often say that they were surprised on entering practice,* say they are concerned for the amount of unethical behavior today, and in this connection mention the serious matter of exploiting clients; and they more often refer to party politics in the court organization as a cause of low ethical standards. By contrast, the college graduates among the criminal lawyers tend to deny that lawyers are unethical; and they find the reasons for nonprofessional behavior in the incompetence of the criminal court personnel.

In part, the above relationships may be based on the higher ethical standards observed by the group of college graduates and possibly their ignorance of the real extent of deviation from professional codes. The author would tend to put more emphasis on an explanation which points to the tendency of certain members of the bar, in this case college graduates, to discount the seriousness of unethical conduct, to identify with the public relations interest of the Bar and therefore to deny in the interview situation as well as to themselves the existence of deviant behavior. Elsewhere in this survey, there is shown to be a category of criminal lawyers who are idealistic, interested in reform, humanitarian, and oriented toward helping the underdog. These lawyers are more often found among the nongraduates of college. The interpretation here is that these attorneys are frank to admit low ethical standards, whereas the experience of a college education is functionally associated with stronger career interests of lawyers who are more likely to overlook lower ethical standards.

The latter explanation finds some support in the fact that the attitudes which admit of unethical behavior are duplicated with about the same frequency among the lawyers with minority religious backgrounds in which group there are fewer college graduates and in which the humanitarian orientation is particularly strong. Moreover, since the degree of specialization in criminal law and income manifest virtually no correlation with the amount of college training, it is not surprising that the former two categories apparently have no consistent relationship with attitudes toward matters of ethics. General practitioners and low income attorneys in the criminal practice are extremely ambivalent toward admitting the existence of misconduct — on the one hand insisting lawyers are ethical, but admitting certain serious violations — and the general practitioner is particularly prone to project the blame for any misconduct on weaknesses in the criminal court.

A CASUAL REGARD FOR PROBLEM OF PROFESSIONAL CONDUCT

In this section we draw from more qualitative information evidence of a tendency to avoid responsibility for unethical behavior.

*A statistically significant relationship when categories are reclassified from Table 2.

The Grievance Committees. Perhaps indicative of a low esteem for the work of grievance committees is the fact that the chairman of one had had no college training and attended no law school. In any case, descriptive material bearing on the work of two committees is presented below.

In one of the areas we were told that the Bar took rigorous action against open solicitation of clients a few years before this study was made. However, in the presence of the interviewer, a "runner" asked an attorney for more business cards and many comments refer to this problem, for example, referring to "the most common unethical practice":

> Hustling cases in jail . . . attorneys blank and blank — see them there all the time. I used to do it myself. Never knew there was anything wrong with it. . . . C78*

*Numbers refer to cases in the sample; "C" to criminal lawyer and "N" to noncriminal lawyer.

> Well truthfully I think there's less of it now (solicitation). Now it's undercover. When I first began everyone was using runners, even I. Later they tried to stop it and the majority of us cut it out, but there are still a few who continue to do it. N62

A member of the grievance committee in this jurisdiction admits that soliciting clients is now the most common complaint. The chairman of this committee adds, ". . . . clients feel that the lawyer has overcharged them, but we've never been able to find such a case." Nevertheless, 12 other respondents mention exploiting clients, including excessive fees, unnecessary litigation, or splitting fees, as that which surprised them upon entering practice; and eight attorneys mention this as the most common unethical practice.

A large proportion of interviewees in another jurisdiction insist that they have a "very clean bar" and all of our information indicates that higher standards prevail than in other areas. The following quotations, however, are all from members of this bar, the first from an attorney active in the local organization:

> (What surprised you?) General attitude of the Bar. Could be on a much higher level. Lack of interest in Bar itself.
>
> (How do you feel about it today?) Bar should be strong. Lawyers should stick together and keep the standards up. (Describe the most common unethical behavior. . . .) Deplorable grievance system here. Whole Bar system here is weak. (1) Measuring your fee — undercutting the standard — have done this myself; (2) Accepting two fees on a divorce charge — one initially and one from the settlement. N110
>
> To be really successful, make a lot of money, any lawyer has to cut corners. If you're strictly unethical you'll starve to death. C111
>
> Yes (I was surprised). I was very naive but soon discovered that there were shady deals in law just as in other professions. C88

Projection of Unethical Conduct. Criminal and civil lawyers are likely to hold the opposite field of practice responsible for violations of professional ethics. These and other targets are selected for blame in the following excerpts. "What do you think of the practice of criminal law?" Answer from a civil lawyer:

> It is the finest profession there is, but you cannot be successful there unless you feed the bondsmen — but law and criminal law much more ethical than medicine. N43

From a criminal lawyer:

> Never wanted to be anything but a criminal lawyer. Love trial work. Have a lot of sympathy for my clients. Actually they're a lot more honest than most judges. C85

Projections onto the corporation lawyer, and the corporation lawyer onto the corporations.

> (Admits nothing unethical.) Actually I think the criminal lawyer does more for the profession than other types in that it is he who spends so much of his time and energy handling "free" cases which

other lawyers feel no responsibility for. It is the criminal lawyer who comes to the aid of those who are being persecuted for political reasons — not the corporation lawyer. C174

About the only thing I can think of is falsifying grounds for divorce. You see in our type of practice — corporate — if there is anything unethical it is the business itself, i.e., the business practices of the corporations the firm represents rather than in the behavior of the lawyers. I think you find that sort of thing (unethical behavior) is more prevalent in courtroom work — the trial lawyer. N169

The partial truth that lies in these accusations also projects blame on others while detracting attention from the shortcomings of one's own group.

Courtesy Among Lawyers. Honesty and courtesy of lawyer vis-a-vis lawyer is essential to efficient legal service, nevertheless one is struck by the extent to which respondents tend to interpret questions on professional ethics as exclusively a matter of courtesy among colleagues, better known as professional etiquette. These illustrative comments are replies to the query on surprise concerning a casual regard for ethics.

No, because I haven't witnessed any breach of ethics, they have been damn nice about that. Several times I have made mistakes in court and the other lawyers will later call me up and tell me what I'm doing wrong. . . . C46

I was surprised at the great degree of camaraderie among attorneys. Even though their respective clients are on opposite sides of the issue — are not even talking to each other — they (the lawyers) will get together and try to work out a settlement. Frankly I was amazed at the amiability of lawyers. . . . N162

Some respondents confuse matters of ethics with the problem of unauthorized practice by non-lawyers; and, furthermore, action by grievance committees is often predicated on probable public relations effects rather than protection of the public interests.

ARE CRIMINAL LAWYERS MORE UNETHICAL?

When civil lawyers are asked whether they ever considered going into criminal law, 26 per cent refer to the low ethical standards of the practice. This opinion is supported by the comparative frequencies with which attorneys in the two fields admit surprise at the casual regard for matters of ethics. Yet respondents in the two branches in approximately equal numbers acknowledge "most common unethical practices" in their respective fields, specify equally serious types of misconduct, and know of cases they believe were not properly handled by grievance committees. Moreover, the greater frequency with which criminal lawyers admit surprise or concern for the problem of ethics may be a function of a less reticent personality type. This interpretation finds some support in the fact that nongraduates of college are most often among those concerned with ethical standards and that criminal lawyers predominate in the category of nongraduates.

In replying to the query on "the most common unethical behavior in the civil practice" there are respondents in this field who question the association of low standards with the criminal practice:

Subornation of perjury, especially in negligence work. You will find as much bad stuff in negligence work as you will find in the field of criminal law. N41

From an attorney who formerly was an inferior court judge:

By and large criminal lawyers are as ethical as any other lawyers. They may be tricky, but they have to be. People don't understand that all the tricks they use are perfectly legitimate. N122

An attorney who used to do some criminal work:

More fraud in civil; on the whole the criminal lawyer is very ethical. N1

"What do you think of the practice of criminal law?":

Necessary, is not more evil than other branches of law. Does not deserve as bad a reputation as it has. N39

With the data at hand one cannot disprove the assumption that the criminal practice has more than its share of violations of professional norms. It would appear reasonable to suspect, however, that the tendency to disregard ethical standards is not so much limited to this field as it is more generally characteristic of some attorneys in certain segments of the bar: the lower status fields of negligence, domestic relations as well as criminal law. The assertion is made with two qualifications: (1) responsibility for the condition must also be shared by other segments of the Bar, including the grievance committees, for their indifference to the condition; and (2) it is largely a matter of personal opinion whether the amount of misconduct which exists is more than should be expected among members of any profession.

Disciplining Members of the Bar

Compliance with the canons of professional ethics is difficult to maintain in the face of complexities of conflicting interests. Otherwise, it appears that unethical behavior in the legal profession is largely a manifestation of pressures from the commercial world which from example of income level and amoral behavior as well as requests for professional assistance in dishonest activities plague the practitioners in business law. To this observation it should be added that relatively low standards of recruitment in the field of law — including nonaccredited schools, the preceptorial system, etc. — have made the practice not only extremely competitive but also one allowing for many to enter the bar with insufficient financial means to establish a practice. Spokesmen for legal education and admission requirements have put emphasis on law school courses in professional ethics and more rigorous character investigation (1, pp. 241-244; 7, Ch. 3; 2, Ch. 6), though the writer shares the opinion of some of these authorities that experience with what actually takes place in law practice tends to outweigh formal indoctrination. In regard to the criminal lawyer in particular, his close association with the personnel of the criminal court — a court that is usually politically oriented — does not contribute to a professional orientation (9).

The professional organization itself, including its special activities regarding ethical conduct, is also a factor in the discipline of members. We report below on the integration of this aspect of professionalism with various segments of the Bar.

Activities of Grievance Committees. Each of the five local bars of this study had within its organization a grievance committee with which complaints against lawyers are filed, in vestigations of cases are made and action, if any, is initiated. Although lawyers may be sued and prosecuted through ordinary legal channels and judges may possess authority to disbar, the grievance committee is the agency of primary jurisdiction in the enforcement of professional ethics and lawyers themselves are responsible for applying sanctions in cases of misconduct. There are excellent reasons for this common procedure among the various professions. For one thing, it may aid greatly the psychological internalization of professional norms — the most effective means of social control in any group — and for technical reasons lawyers are obviously better qualified to judge cases in their own profession. To carry out the former function, however, the grievance committee must play an active role in all segments of the bar.

We are mainly interested in the ex-

tent to which various categories of lawyers participate in the work of these committees. The first of four questions in this area merely asked the respondent whether the local bar has a grievance committee. Four criminal lawyers and two civil lawyers said their bar did not have a grievance committee or they were not sure whether one existed. Table 5 shows the relative degree of participation on grievance committees by each field of practice.

TABLE 5

MEMBERSHIP ON GRIEVANCE COMMITTEES
(PERCENTAGES OF RESPONDENTS)

Participation Total respondents	Criminal Lawyers (98)	Civil Lawyers (104)
Served on grievance committees	7%	18%
Never has served	93	82
Totals	100%	100%

We find that civil lawyers have served on grievance committees over twice as often as criminal lawyers (18 as compared with 7 per cent: $X^2 = 4.62$). Only seven or eight per cent of the members of either branch of the profession have ever preferred charges on anyone. This proportion appears to be relatively low in terms of the last in this series of questions: "Do you know of any cases where grounds existed for preferring charges, but they were not preferred, or were not pressed, *or* they were not in your judgment properly handled?" About 40 per cent of the lawyers of each field answer this in the affirmative.

Further analysis of the types of lawyers who participate in the activities of grievance committees suggests to us how they function in the organization of the local bar. It may be significant, for instance, that of the six attorneys who were not aware of their grievance committee, all received low incomes and four had not graduated from college. Of greater statistical significance are the characteristics of lawyers who have been members of these committees. Civil lawyers serve more often whatever their income, which discounts the income differential between the groups as the only factor disqualifying criminal lawyers.* In both groups, however, there is a greater preponderance of high income lawyers among the members of grievance committees.** In regard to the questions of having preferred charges and knowing of cases not properly handled, income of the lawyer, however, is not related. In fact the only significant variable is religion of the lawyer; Protestant lawyers more often lodge complaints against colleagues.***

Participation on grievance committees — serving, preferring charges, or knowing of improper handling — it is interesting to note, is totally unrelated to the attorney's graduation from college. Positively, the committees are

*In most cities the average income of criminal lawyers is lower.

**Twenty-three per cent of high income as opposed to only four per cent of low income lawyers participate on grievance committees: statistically significant with a chi square value of 12.21. Controlling for age demonstrates that this factor does not account for the relationship.

***"Has preferred charges," Protestants 13 per cent against 3 per cent; significant with a chi square value of 5.30. "Knows of cases not properly handled," Protestants 48 per cent against 31 per cent; significant with a chi square of 5.40.

dominated by high income civil lawyers, while Protestants, regardless of income or education, seek more action. These latter attorneys are apparently projecting their standards on criminal lawyers and other lower status fields of practice that are more dominated by members of minority religions.

Participation in Professional Organizations. Unlike physicians, all lawyers are not members of local societies that are integrated in a national association, and although local bars may nominally include all practitioners, they are often loosely organized activities. Consequently, participation in the special purpose professional associations in legal work is indicative of a lawyer's professional commitment.

Membership of criminal lawyers in the American Bar Association shows that they belong to this group less than half as often as other lawyers, with percentages of 14 and 31, respectively,* and further analysis reveals that specialists in criminal law belong to the Association even less frequently than other criminal lawyers. There is no relationship between membership and extent of college education, but income is highly associated with belonging to the ABA among both criminal and civil lawyers.** That criminal lawyers in general enjoy more modest incomes than their colleagues is only a partial explanation for respondents' comments suggest a more meaningful correlate of nonparticipation. The ABA is accused of discrimination against the Negro or of being a politically conservative group. More generally, however, it is probably the lower status position of criminal lawyers and that the ABA is a high status group which explains their nonparticipation. Criminal lawyers feel they are outsiders and that the ABA has little to offer them professionally.

There are numerous other professional and semiprofessional, local and national, organizations to which lawyers belong: legal fraternities and honorary societies; the American Judicature Society, the American Law Institute and similar national organizations; and all associations in any way related to legal work such as real estate, claims, accounting, insurance, maintenance of law and police work, trial law and legal aid. Respondents from the two branches of the profession were compared on a composite index of professional participation in all types of societies related to law, excluding local bar associations to which lawyers nominally belong.***

This comparison shows that attorneys in the criminal practice are likely to remain outside these professional organizations: a majority of 60 per cent compared with 44 per cent of other lawyers belong to none of them; and as we go from inactive to active status as measured by our index, the proportion of civil lawyers becomes greater.**** Regardless of the subcategory of criminal lawyers a disinterest is shown in professional associations, but among their colleagues in other fields participation is most char-

*A significant relationship; chi square is 7.47.

**High income, 37 per cent as opposed to low income lawyers, 10 per cent; a significant relation with a chi square value of 16.77. This relationship cannot be accounted for by age.

***The index differentiated between inactive and active membership and whether the respondent was an officer of the group during the years 1949 to 1951, allowing one point for an inactive membership, two points for an active membership (attends meetings two or more times a year), and three points for holding an office. Each respondent was given a total score based on all memberships in these professional and semiprofessional organizations.

****In a 2 x 2 table the relation is statistically significant; chi square is 4.74.

acteristic of those in higher income brackets.

CONCLUSIONS

Comparative data on professionalism in the practice of criminal law have been presented. In a series of responses to questions concerning unethical conduct, the conceptions of many lawyers portray the legal profession as exhibiting relatively serious deviations from professional norms. Lawyer-opinions do not limit violations to one segment of the bar, but compromises with standards may be concentrated in the negligence, domestic relations as well as the criminal practice, and indifference to these standards is exhibited by all sections of the bar. Self-images among practitioners are not always flattering, nor are they conducive to maintaining professional standards.

Whether violations of ethical codes are viewed as serious or inconsequential, a meaningful sociological contribution lies in their analysis as manifestations of behavior in a structure of social relations, i.e., the professional institution. Here we have analyzed only one aspect of this system: namely, ineffective integration of certain segments of the bar (primarily practitioners in criminal law and all lawyers having low incomes) with enforcement procedures for maintaining standards and with professional organizations. Whether the better educated lawyers are themselves more strongly committed to professional ethics, we are unable to say. They are, however, apparently more indifferent to unethical practices as they exist and they are not more active either in joining professional organizations or on the grievance committees of the Bar.

Not discussed here are other characteristics of the professional system related to this problem such as the unintegrated role of the solo practitioner and compelling career aspirations which focus on community and political rather than professional activities for advancement. The import of these is a matter of judgment, but they are correlates of deviations from professionalism as seen in a tendency to identify with the interests of clients, toward differential treatment of clients, and toward substituting contacts for technical knowledge in servicing clients.

Shortcomings of the legal practice as a professional system must also be explained in terms of the *conditions* within which it operates. Thus, it has tried to cope with large numbers of upwardly mobile persons and overcrowding; with practitioners unable to achieve reasonable success by diligence and technical knowledge alone. Work for these practitioners neither constitutes a regular clientele able to pay reasonable fees nor even a service which is always technically legal. Moreover, these lawyers practice before lower courts often lacking in professional competence, and in communities where career aspirations are invidiously tied to a stereotype of successful businessmen.

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PROBLEMS OF TOMORROW

THE PROSPECTIVE IMPACT OF LARGE SCALE MILITARY RETIREMENT*

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SCOPE OF THE PROBLEM

Beginning in 1960, and continuing through the ensuing decade, a mass migration will take place into the civil society of the United States. The "emigres" will be the large number of men who entered the Armed Forces during the World War II emergency and who remained on active duty thereafter, or who were recalled to active duty during the Korean War and remained in the service. During the next decade, these men will become eligible for retirement by virtue of having completed 20 years of active service.**

The number who will actually retire upon achieving 20 years of service or soon thereafter is difficult to estimate, being contingent upon such factors as individual choice, personnel policies of the Defense Department and possible changes in relevant statutes (13; 14).

*The author acknowledges the aid of George W. Croker, Colonel, U. S. Air Force, and Joseph B. Glenn, Office of the Assistant Secretary of Defense (Manpower, Personnel, and Reserve Affairs) in developing information for this paper. Valuable assistance was received from the Retired Activities Officers of Headquarters, Department of the Army, and Headquarters, U. S. Air Force.

**The present paper is addressed primarily to retirement on length-of-service eligibility. Of the approximately 231,000 persons currently receiving military retirement pay, slightly more than a third are on the disability lists, but barring hostilities, disability retirements will constitute a much smaller proportion of future retirements.

Preliminary estimates by the Defense Department, using actuarial assumptions, and assuming stable overall strength of the Armed Forces, predict that the number of persons in the United States receiving military retirement pay*** will increase from 231,000 at present to 405,000 by 1965 and 753,000 by 1973 [Table 1] (14).

Those who, with continuous service, would become eligible for retirement within ten years include more than 25 per cent of the total current active strength of the Armed Forces and 55 per cent of the officer corps. Over a third of all active duty officers had completed more than 15 years of service in June 1958 (12). The impact of prospective retirements on the structure of our military establishment is consequently a matter of great interest to military sociologists. The present paper seeks to direct the attention of social scientists to other aspects of this problem, however: the significance of this concerted institutional mobility for the communities into which these men and their families will move, and the problems which will confront the retirees themselves.

DISTINGUISHING CHARACTERISTICS

The size, concentration in time, and

***Persons who elect to receive veterans' disability compensation in lieu of all military retirement pay, or who waive all retirement pay in accordance with the Dual Compensation Act are not included. Currently, according to the Veterans Administration, between 5,000 and 6,000 men annually go from active military duty to its disability rolls.

TABLE 1

NUMBERS OF PERSONS RECEIVING MILITARY RETIREMENT PAY: ACTUAL 1954, 1958 AND PROJECTED 1963-1983*

Fiscal Year	Disability Retirements**	Non-Disability Retirements***	Total
1954	78,953	89,789	167,742
1958	80,697	132,860	213,557
1963	89,000	245,000	334,000
1968	101,000	428,000	529,000
1973	113,000	640,000	753,000
1978	122,000	852,000	974,000
1983	127,000	1,036,000	1,163,000

*Inclusive of Fleet Reserve, but exclusive of Survivor Benefits. Data and preliminary estimates from Office of Personnel Policy, OASD (MP&R), Department of Defense.

**Temporary and Permanent Disability Lists.

***Non-Disability Retirements and Fleet Reserve.

composition of this retired population will distinguish it from precedents in the history of retirement. Unlike most other retirement systems, military retirement uses the criteria of length of service and physical condition rather than age as the primary determinants of retirement. As a consequence, the military retiree is far younger at time of retirement than his civilian counterpart. The most recent compilation of data on age at time of retirement for military personnel gave the average age of all retirees as 35.8 years; the average age of those retiring on length of service eligibility was 45.8, and of those retiring for disability, 25.9 (13). The bulk of the prospective large-scale retirements, consequently, will be comprised of men in the active years.

Those who retire upon achieving 20 years of service will have retirement remuneration amounting to somewhat less than half of their earnings prior to retirement. By ordinary standards, and in view of their retaining some of the perquisites of military personnel such as free medical care, this will be relatively high retirement income, and those who retire after additional years of service will receive even higher retirement pay.* At present, the mean retirement pay of non-disability retirees is slightly over $3,000 per year (13). While substantial, the retirement pay of most retirees will be considerably short of that required to maintain their accustomed plane of living. The large majority will doubtless seek full-time employment.

The term "retirement," consequently, will hardly be applicable in its ordinary meaning to the life pattern of most of the emerging group for some time after they "retire" from the service. Indeed, the Army tells its personnel to regard the move as "changing your career" (11) rather than "retirement."

Attention given by social scientists to the problems of the military retiree may help clarify knowledge of retirement problems, generally, despite the atypical characteristics of the military group. Indeed, the relative youth of the military retiree may make comparisons with retired civilians particularly profitable. Problems of an abrupt and radical change of occupational career and life style can be studied among this large popula-

*The complexities of legislation affecting retirement pay for military personnel, veterans' benefits, and the inclusion of military personnel in the Social Security system, cannot be discussed here. For information of a summary kind, see 8; 9; 10; 11).

tion apart from the confounding influence of the physical effects of "old age" and the cultural definitions of the aged to which many retirees have to adjust. On the one hand, it may be possible to eliminate physiological effects of aging or cultural conceptions of these effects as the causative factors in certain adjustment problems. With respect to other problems, however, it may be found that what confronts the younger military retiree may have only semantic similarity with the retirement problems of the older civilian. The frames-of-reference with which social scientists are approaching the problems of the worker affected by automation may have greater relevance than the conventional "geriatric" orientation to the immediate problems of these military retirees. Geriatric considerations are not irrelevant to this group, however. The need for an occupational readjustment, the consciousness which the status of "being retired" may provoke, and systematic exit counselling of retirees by the Armed Forces might be expected to lead members of this group to consider the problem of later years in the choices they make immediately.

THE "SECOND CAREER"

The special characteristics of the military retirement problem may provoke more general reconsideration of retirement systems by presenting in a radical form more widespread anachronisms of policy. Early retirement in the military system is justified primarily in terms of the special requirements for physiological fitness of military life. In this respect, however, it cannot claim distinctiveness from many other occupational institutions.

A problem like that confronting the military establishment arises in any institution which operates with the "career employee" concept: the civil service, the university, and increasingly, major industry. The "career" concept has the dual implications of vertical mobility in the institution with advancing age (length of service) and permanent reciprocal commitments of the employee and the institution. Vertical mobility within the institution accompanying seniority is correlated with movement toward the sedentary in the occupational duties performed. This movement, with the help of mortality and the expansion of internal and external occupational opportunity, which has existed during recent decades of rapid economic growth, has allowed the career system to operate without overburdening institutions with personnel having the restricted physiological abilities of later life, and without a too blatantly "top heavy" rank distribution.* Problems arise, however, where the ratio of swivel-chair to line jobs cannot be expanded rapidly enough to accommodate to the system. This kind of problem has been aggravated, in general, by the increase in the average life span; and in the military by a disproportionate retention of personnel in the higher grades from its swollen wartime ranks.**

Institutions are confronted with the necessity of pushing personnel out (or inducing them to leave) at an age the culture regards as "mid-career." These are persons to whom the institution has a permanent commitment, and who, in turn, have made a sacrificing commitment to the slow acquisition of the distinctive skills and other occupational credentials required by that institution.

The Army's concept of a "second career" is more consistent with the realities of this situation, and with re-

*The pressures the seniority system creates may account in part for the operation of "Parkinson's Law" in bureaucracies (5).

**The ratio of commissioned officers to enlisted men is currently about 1/7 (14).

ducing the costs to the institution, the individual, and the society, than is the concept "retirement." Congressional appropriations committees, confronting the burden of military retirement pay reaching two or three billions annually, have already indicated their intention to reexamine the retirement concept as it pertains to the military establishment (8).

Social scientists, the writers believe, could profitably give attention to "the second career" as an emergent pattern. The military retiree population affords a favorable opportunity for investigations of what will be the inevitable and the desirable characteristics of "second careers."

From considerations discussed here, one would expect the career change to involve initial downward mobility in terms of the prestige status of the "second career," but with "retirement" pay, this may be associated with improved economic status — an incongruity of status which may be of some theoretical interest for the study of social mobility. From the same considerations, occupations having characteristics quite unlike those of bureaucratic "career" institutions will in certain respects be more attractive and desirable as "second careers," despite the conditioning the individuals pursuing "second careers" will have had to bureaucracy. Thus, occupations in which the seniority system does not play an important role would be favored; those which involve highly general rather than very specific skills; etc. (cf. 1).

Concentration of Impact in Space and Time

The concentration of these retirements in time and space increases the likelihood of their having a discernible impact as social problems. Thus, there will be a marked increase in the rate of retirements during the 1960's (Table 1). Further, if past patterns of settlement upon retirement prevail, there will be a tendency for great concentrations in a few localities.* Almost half of presently retired officers are concentrated in five states: California, Florida, New York, Texas, and Virginia (6, p. 10). A cursory examination of address files indicates that a few localities in these states account for much of the concentration: particularly favored are San Antonio, Texas; San Francisco-Oakland (particularly, the Lower Peninsula) and San Diego, California; the northern Virginia suburbs of Washington and Norfolk, Virginia; the East and North coasts of Florida; and the New York Metropolitan Area. The tendency toward concentration is fostered by the great advantages the retiree derives from settling in the vicinity of a large, permanent military installation; important considerations include the quality of hospital, recreational, exchange and commissary facilities, as well as the likelihood of one's close friends in the service living in or visiting the locality. Areas of large military concentration are also favored by more retirees simply because more of them are familiar with the locality. One armed forces retirement counsellor reports that currently retiring personnel are loathe in many instances to select as places to settle areas which are defined as "military elephant graveyards" such as San Antonio. Newly popular localities include Phoenix, Arizona; Colorado Springs, and Denver, Colorado; Montgomery, Alabama; Honolulu, Hawaii; and Seattle, Washington. The preferences of Air Force retirees, who are just beginning to be represented in large numbers in the entire population, will also make for shifts from the traditional pattern.

Such dispersion as takes place, however, will be dispersion only relative to the past. A small number of com-

*For comparison with civilian patterns of mobility upon retirement, see (2).

munities may still be expected to absorb the majority.

JOB COMPETITION

One effect of this concentration in place and time will be competition for jobs among the retirees and between retirees and other groups. The possibility of the entrance into the civilian labor force of selected communities of large numbers of persons for whom it is economically feasible to accept employment at rates of remuneration below that prevailing for persons of comparable status is a development some will see as a threat. According to Armed Forces counsellors, however, the aspirations and expectations of current retirees are rarely modest, and they generally visualize the status and earnings they can legitimately demand in the civilian world as higher than that which the experience of past retirees indicates they will achieve.

There will be represented a broad, but nonetheless atypical sampling of skills, experience and other credentials for entree to civilian occupations. Some will meet qualifications for certain critically short occupations or will be able to acquire them readily. Special study has already been given to the possibilities of remedying the shortage of teachers of science and mathematics by encouraging qualified military retirees to take such jobs and special "retread" courses have been established at two universities for the purpose of quickly qualifying retirees for this work (6). Others, however, will possess no readily marketable distinctive skills (e.g., the infantryman). Of major interest will be the competition among the group in skill areas in which large numbers of military personnel are concentrated (e.g., administration, aviation).

The possibility of serious job-finding problems is increased by the fact that the crest of these retirements will coincide with general demographic changes making for a vast increase in the number of persons seeking employment. During the next five years, there will be a probable increase of 40 per cent in the number of persons aged 20 and under who will enter the labor force (12) — another effect of World War II appearing 20 years after its genesis. This will make the outlook particularly difficult for those retirees planning to take part-time jobs, for they will be in competition for many of these jobs with tremendously expanded ranks of college students.

At any rate, the ability of the economy and communities to absorb retired military personnel at present and in the past provides a poor index to what the case will be when the flow is increased by a factor of three.

IMPACT ON COMMUNITY INSTITUTIONS

The concentrations in time and space of the group may have a decided impact on the institutions in which large numbers of military retirees assume roles. Thus, while some school administrators look hopefully to the emerging retirees as potential remedies for teacher shortages, others may be anxious regarding the influence upon a school system of "the military man" (cf. 7).

Retirees, particularly the retired officer, are also likely to participate disproportionately in voluntary associations, both those of a distinctive character like the Retired Officers Association and the veterans organizations, and those of more general recruitment, such as political, business, and charitable organizations. Casual examination of the Washington, D. C. area press indicates extremely active participation by retired military personnel as leaders of parent-teachers associations, community associations,

and political pressure groups.* The freedom many will have from the pressures of devoting full energy to making a living can allow unusually great participation in voluntary association affairs. Skills many have developed in military life for exercising authority, making oral presentations, and participating in organized meetings may increase the gravitation of military retirees to positions of leadership. The Armed Forces have encouraged their active duty personnel to participate in non-political civic affairs, and a report on such participation is included in "Officer Effectiveness Reports." This may also increase participation after retirement. Participation is also urged on retiring personnel by the services, which see a valuable public relations potential in their activities (9, pp. 95-96; 10, p. 9).

Group Identification

The concentration may also lead to a social stereotyping of military retirees as a group in the localities of heaviest settlement; and a corresponding tendency for this aspect of one's status to assume a central position in the self-definitions and group identifications of the retired military personnel. The consciousness on the part of the public of the presence in their midst of large numbers of retired military personnel, and some affect toward their presence, will presumably be heightened as the tax dollars going to meet the bill for retired pay mount rapidly. The total in the budget for the present (1960) fiscal year is $715,000,000, and it will exceed a billion dollars per year by 1964.**

Socialization Problems

Goffman (3) includes the military in that class of social arrangements he calls "total institutions." "A basic social arrangement in modern society," he writes, "is that we tend to sleep, play and work in different places, in each case with a different set of coparticipants, under a different authority, and without an over-all rational plan. The central feature of total institutions can be described as a breakdown of the kinds of barriers ordinarily separating these three spheres of life." To Goffman's list of distinctive arrangements might be added the distinctive culture and ideology of the military. The social scientist, and the man in the street, probably visualizes the problem of adjusting from life in such a "total institution" to that in the civil society where "each is on his own" as the major problem confronting the serviceman on "getting out."

Goffman's interest in that paper was in the socialization to total institutions of persons from the "open" society: the novice to the convent, the prisoner to the penitentiary, and the patient to the mental hospital. The movement discussed in this paper may be conceived as the reverse. A key question to the prediction of the adjustment problems of the military retiree, and many of the problems involving his prospective impact on the community, involves the degree to which Goffman's model, and similar conceptions, indeed hold true of the military institution in American society as it has been during and subsequent to World War II, however. Certainly, it departs considerably from the ideal-typical extreme.

The kinds and extent of the adjustment problems of the military retiree may be approached from a different perspective than that thus far

*The political activity of retired personnel is not restricted by the Hatch Act (53 *Stat.* 1148; 5 *U.S.C.* 1181), although certain political activity involving the Armed Forces is prohibited retired personnel of the regular components (8, p. 18).

**This is exclusive of the veterans' disability compensation some retired personnel are eligible to receive in lieu of some or all of their retirement pay.

discussed in this paper, namely, for what they might reveal about the nature of the military institution and the military role in American society. One hypothesis would be that the military role is not as distinctive as popularly supposed, and consequently, that only minimal changes of life style and ideology will be required for the adjustment of the average retiree. Whether great or small, however, the nature of these changes may be a basis for illuminating inferences regarding American society and the place the military institution occupies within it (cf. 4).

CONCLUDING COMMENT

This paper has illustrated just a few of the more obvious topics of high social and theoretical significance which should attract the attention of social scientists to impending large-scale military retirements. The potential contributions of research done before the full impact of these developments is felt has obvious value for the many institutions which will experience this impact. An unusual opportunity also exists in that there is still time for the study of a major and unprecedented social development before, as well as during and after the event. The utility of sociological theories, formulations and techniques for predicting consequential events can be tested best by attention to the "Problems of Tomorrow."

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BOOK REVIEWS

Desegregation and the Law: The Meaning and Effect of the School Segregation Cases. By Albert P. Blaustein and Clarence Clyde Ferguson, Jr. New Brunswick: Rutgers University Press, 1957. 333 pp. $3.50.

This book is a carefully detailed exposition of the legal background and significance of the Supreme Court's decision in *Brown v. Board of Education,* more popularly known as the School Segregation Cases. The authors are members of the Rutgers Law School faculty, but the book is addressed primarily to a nonlegal audience and is excellently executed for this purpose. Definitions and explanations are given of both common and uncommon legal terms such as *habeas corpus,* "case," judicial review, "justiciable," petition for *certiorari,* precedents, *stare decisis,* "state action," dicta, and *per curiam* decision. These definitions and explanations tend occasionally to give the book the tone of a student's dissertation, but, in general, the book is written in an easy flowing narrative style.

In tracing the background of the Supreme Court's decision in the School Segregation Cases, the authors utilize a series of chapters to examine the individual records of the justices on civil rights cases, to detail the general authority of the Supreme Court to interpret the Constitution, and to describe the reactions to the School Segregation decisions. The authors set themselves the task dealing solely with the law and avoiding discussion of "the philosophy or the sociology of segregation." Not surprisingly, they were unable to hold to this objective, and one finds them stating, when discussing patterns of compliance, that "The South is more than just another American region. It is also a state of mind." This is followed by a discussion of social factors which they believe to have influenced variations in the extent of Southern compliance.

Social scientists will find special interest in the authors' discussion of the relevance of nonlegal materials in the judicial decision-making process and in their conclusion that "the social scientists cannot be entirely credited or blamed for the decisions rendered in the school segregation cases" (pp. 136 and 156). The authors' reservations as to the use of nonlegal materials in judicial decision making should prove instructive to social scientists who are participating increasingly in litigation as expert witnesses.

One of the chief limitations of the work is the tendency to treat the terms "integration" and "desegregation" as synonymous (cf. pp. 212-213). This is done without explanation and in spite of the fact that Judge Parker's court was quoted as stating that "The Constitution . . . does not require integration. It merely forbids discrimination" (p. 179). This failure to distinguish between "integration" and "desegregation" serves to obscure somewhat the authors' meaning as to the role of the law.

The book has a valuable appendix consisting of the texts of the School Segregation Cases, an extensive Table of Authorities, and a useful and comprehensive Table of Cases relating to desegregation and the law. It is a book which belongs among the reference works of anyone interested in the relationship of law to desegregation in the United States.

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Sentencing, Volume 23, No. 3, Summer 1958 Issue of *Law and Contemporary Problems,* 399-582 pp. (Duke University School of Law).

Crime and Correction, Volume 23, No. 4, Autumn 1958 Issue of *Law and Contemporary Problems,* 583-783 pp. (Duke University School of Law).

These two volumes taken together include nineteen separate articles, a total of some 380 pages, the contributions of twenty (one article has two authors) well-known and distinguished persons in the legal-criminological-penological field of today. Detailed comment on this array of scholarly output is quite impossible in a short review. Only a few general characterizations and some selected illustrations of typical and pertinent content will be attempted.

Symposia of this sort tend to become discursive expositions of a number of designated topics rather than carefully written, closely reasoned analyses of a central problem developed through some of its logically related ramifications. The volumes under review are no exception to this tendency. The multiplicity of authors and of points of view leave little opportunity for any unity of discussion beyond the central or principal title of each volume.

The volume, *Sentencing,* includes nine articles ranging from the legal-philosophical-didactic discussion "The Aims of the Criminal Law" by Henry M. Hart, Jr., Professor of Law, Harvard University, to a factual, statistical study of "Comparative Sentencing Practice" by Herman Mannheim of the London School of Economics

and Political Science. Between these — the first and last in the volume — are seven other contributions dealing with a variety of problems, including discussions of psychiatric diagnostic techniques (Ralph Brancale); prediction devices (Sheldon Glueck); sentencing by an administrative board (Norman S. Hayner); effects of sentencing structure on administration of justice (Lloyd E. Ohlin and Frank J. Remington); contradictions in juvenile court processing of offenders (H. Warren Dunham); sentencing under the Model Penal Code (Paul W. Tappan); and a critique of the Model Code (Will C. Turnbladh).

The contradictions inherent in this collection of articles are well illustrated in the miles-apart views of the two Harvard University contributors, Henry M. Hart, Jr., and Sheldon Glueck. Hart's "Aims of the Criminal Law" is a stout defense of the traditional view of punishment as "the method of the criminal law" for the control of crime. There is vehement rejection of the notion that crime is "anything which the legislature chooses to call a 'crime'." Instead crime is defined as "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community" (p. 405). With reference to the nature of punishment the statement is quoted with approval that "It is the expression of the community's hatred, fear, or contempt for the criminal which alone characterizes physical hardship as punishment" (p. 405). On the other hand, the argument of Glueck's "Predictive Devices and the Individualization of Justice" is not at all concerned with the problem of the proper moral condemnation of the offender but with operational procedures for the objective implementation of the principle of individualization of sentences in terms of the many factors involved in the circumstances of the crime and the individual's native equipment and previous experience.

In none of the discussions of sentencing is there any mention of a basic dilemma that most sociologists would note first of all, namely the existence of great diversity, incompatibility, and conflict of values and of morals within the modern political state that writes the laws regulating behavior. The glib phrase "moral condemnation of the community" is only a convenient legal fiction; it is not a realistic fact of the modern world of political organization. Only some part — a sub-community within the larger political community — views with moral condemnation the conduct defined as crime by the more extensive political state. Other sub-communities of the same political state may condone, or perhaps even approve of, the conduct forbidden by law. A candid recognition of these "facts of life" would have strengthened greatly a useful and valuable discussion of sentencing in the administration of justice.

The volume, *Crime and Correction,* includes ten articles by as many authors, arranged to provide discussion of three principal "approaches" with some additional special topics coming in for attention. After a short introductory account of "historical perspective" (Thorsten Sellin), there is a presentation of "the legal approach" (John Barker Waite), and a "critique of the legal approach" (Andrew S. Watson); then a presentation of "the psychiatric approach" (Manfred S. Guttmacher), and a "critique of the psychiatric approach" (Michael Hakeem); then a presentation of "the sociological approach" (Daniel Glaser), and a "critique of the sociological approach" (Frank E. Hartung); discussions then follow on the three topics, "white collar crime" (Donald J. Newman), "the value and effectiveness of correctional techniques" (Donald R. Cressey), and "some reflections on the role of correctional research" (Alfred C. Schnur).

Much that is said in the 200 pages of this collection of articles is only a more or less systematic reformulation of ideas, problems, and criticisms that have long been reviewed and discussed in the contemporary literature in the field. The significance of the volume lies primarily in its service function in providing a convenient review and discussion of an extensive literature, more or less enjoyably mixed with authors' judgments and personal prejudices.

There is a notable difference in the "legal approach" as formulated by John Barker Waite in this volume and that argued by Henry M. Hart, Jr. in the volume on *Sentencing.* The "critique of the legal approach" in the volume *Crime and Correction* is much more specifically applicable to the legal view presented in *Sentencing* than to the article by Professor Waite in the context in which it appears in the volume *Crime and Correction.* This demonstrates again the fundamental problem of all law in relation to social control, namely, whose law is it that is under discussion. The answer to that question is often more revealing than the details of the discussion itself.

Persons interested in the study of social problems involving crime and its treatment

have reason to be grateful to Duke University's professional journal *Law and Contemporary Problems* for including these two issues or volumes in the schedule of publication. They are useful additions to any informed person's library in this area of the study of social problems.

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The Population Ahead. Edited by Roy G. Francis. Minneapolis: University of Minnesota Press, 1958. 160 pp. $3.75.

Population and World Politics. Edited by Philip M. Hauser. Glencoe, Ill.: The Free Press, 1958. 297 pp. $5.50.

These two volumes contain papers by economists, demographers, political scientists, sociologists, geographers, biologists, eugenicists, and others in related disciplines. Both sets of papers were continuations of conferences held about a decade ago, and they represented attempts to delve more deeply into the topic of population and its related aspects.

The papers in *The Population Ahead* were delivered at the University of Minnesota and centered on the physiological and cultural qualities of population, rather than on the quantitative aspects which was the theme of the conference a decade earlier. The papers were written in layman's language, as a method of insuring greater awareness of population problems by other than experts.

Topics of interest included the discussion of the aftermaths of hunger as a threat to world peace and the role that hunger plays in political strife, especially war. Undernourishment is often the cause and the result of political upheavals. Persons undergoing long periods of malnutrition, whether from unrest, water shortages, or crop failures, may "catch up" physically when food is again available, but the experience leaves deepseated emotional scars that may alter the philosophy and attitudes of the deprived.

Another subject of interest, but of which little is known, is the possible effects of mutations and chromosome aberrations which may occur in persons who are exposed to the effects of the industrial uses of atomic energy. The latter, intended to be beneficial to mankind, may reduce the life expectancy of the exposed as well as increase the incidence of defective births.

Much space has been devoted to the concept of "optimum" population. There is general lack of agreement as to what "optimum" means, whether manpower, standard of living, or land-man ratio. One author, Professor Frederick Osborn, suggests agreeing on an "optimum rate" of population growth, rather than "optimum size". The "best optimum rate" should be lower than what is agreed upon as "desirable", in order that the production of sufficient goods and services of high quality may keep pace with the growing population. He cites this country today as an example of a population growing faster than the supply of essential goods and services (schools, hospitals, housing, recreational facilities, and so on). Although some consumer goods flood the market, the more costly items — especially those requiring large capital outlays — are not being produced rapidly enough and are often of poor quality. He points out, and rightly, that the average man does not understand demographic trends and is inclined to accept the business man's cliché that "population growth makes for prosperity."

The papers in *Population and World Politics* were read during the latter part of 1954 at the Thirtieth Institute of the Norman Wait Harris Memorial Foundation. Although the volume appeared four years later, the topic is as timely now as it was then. They cover exhaustively the major countries of the world in terms of quantitative as well as cultural factors that have a bearing on population. The lectures are divided into three parts: World Population and Resources; Population, Levels of Living and Economic Development; and Population Policy and Politics.

There is considerable concern today about "population explosion", a concept applied to "under-developed" parts of the world which seem headed for rapid expansion of population in the future through the control of the environment and reduction of death rates. The concept poses the question "how many people will there be in the year 2,000, say, and will there be adequate resources to feed so many?" To answer this question the papers present demographic trends of world growth as well as those of major continents, regions, and countries.

There are included data about countries of the Near and Far East, North Africa, Middle Africa, and South America which are omitted in many population discussions. Fortunately, most of these governments are today initiating modern census-taking methods, so that up-to-date figures are more readily obtained than before World War II. Of equal importance is the need to study the demographic trends of these lesser known areas in the light of their political history under colonialism, to determine how official policy affected the

provision of health, medical, educational, and recreational facilities. As is well known, colonial powers differed in the amount of facilities they encouraged and these had a decided influence on demographic trends.

Of particular interest to many specialists and laymen is the population of China. She not only has the largest aggregation in the world but her demographic trends have defied accurate analysis because of the scantiness of data that were obtained by the ascensal method of enumeration. Since 1950, when the People's Government gained control of the China mainland, one of the first steps toward controlling the population was to learn its size. So, a "count of noses" was undertaken, and the minorities living in the outlying provinces of Manchuria, Mongolia, Tibet, and Sinkiang were included.

Armed with the facts, the People's Government established programs for the maximization of production through human labor, effected reform and reindoctrination of the recalcitrants, and herded masses into cooperatives, communes, labor federations, women's organizations, youth groups, and so on. Densely settled areas had their populations relocated to sparsely inhabited ones, and the migration of people was effectively controlled. Hence, a lesson can be learned from China. A huge population is a decided asset when a semi-feudal, agrarian society is undergoing transformation to an industrial type. Levels of living are low — and will continue to be low — but the masses can replace machinery and production can be pushed ahead.

In former times, demographers feared the "expansive" policies of countries bent on military conquest, such as Germany, Italy, and Japan. Today in China, the "expansive" policy has both an ideological and a military aspect. Masses are needed for infiltration into surrounding countries; they are also needed within the country for interpersonal and intergroup indoctrination.

China's official population of 600,000,000 includes all Overseas Chinese residing in Asia, North America, Taiwan, and elsewhere, because this government upholds the "jus sanguine" principle in determining citizenship. Moreover, many Chinese, though citizens of another country, are active "expansionists", promoting the ideology of the People's Government.

Another concept that needs to be thought over is the levels of living of various peoples, especially as their living habits are influenced by religious beliefs. Demographic trends of South East Asia and the Middle East, particularly, should be examined in the light of religious influences on fertility, food habits, living standards, and so on. Of a certainty, religion influences the size of the family and having sons is more important in India and Moslem countries than attaining a given level of living.

India is concerned with the size of her population, and she is the first densely populated country to adopt a national policy of birth control, if and when relatively inexpensive and feasible methods are available. Another country with a strong religious orientation, Ireland, has successfully curbed population — so much so that there is concern regarding the slow rate of growth.

So long as size of family is a personal matter and the procreators are humans with diversified needs and desires, many of which can be satisfied through offspring, the problems of overpopulation involve too many subtle, unidentified and untested variables to permit more than gross predictions. An excellent illustration is our own country whose rate of growth has far exceeded that predicted for it a decade or so ago. A trend toward larger families and fewer childless couples, a lower age at marriage, and the correction of infertility have all contributed to the upsurge. "Population explosion" is not a concept that applies exclusively to underdeveloped areas.

The reviewer would like to see a set of papers devoted to the consideration of religion as a factor in demographic trends. No Moslem country has yet shown signs of controlling population. Less is known of Buddhist beliefs and practices. The only Buddhist country favoring population control is Japan.

Similarly, a set of papers should be devoted to food as a political weapon: how it is used inside of a country and outside of it to woo friends and control enemies. It can also be used to effect favorable trade balances while the inhabitants of the country with a seeming surplus are denied full rations (China, for example). There is fairly general agreement that hunger and malnutrition provide fertile ground for political strife, and can also be used to promote whatever ideology those who control the food supply wish to promulgate. Less is known of how food may be used as a method of winning friends for the democratic cause without endangering trade and political relations between the democratic nations.

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Education And Freedom. By H. G. Rickover, Vice Admiral, USN. New York: E. P. Dutton and Co., 1959. 256 pp. $3.50.

In this engaging volume Admiral Rickover has gathered together a series of his speeches on the crisis in education, particularly in its relation to our position in military technology, military hardware and research, vis a vis Russia. The seriousness which Rickover has shown in Congressional testimony, and the sense of mission which has underscored his research towards the achievement of an atomic submarine, are apparent throughout the volume. With pronounced individuality and disregard for any consequent personal unpopularity, he has set himself the task of analyzing the vulgarizing and denaturing trends in American education, most of which he attributes to progressive education. Towards the close of the volume he furnishes several illustrations and an analysis of European high school and university curricula, followed by some suggestions for improving American secondary and college education.

The basic concern of Rickover is with the relationship of education to military preparedness and defense. His emphasis here is on the concept of *lead time*, that is to say, the time which elapses between the conception of a new idea, its development, and finally its realization in the form of a finished product. The concept of lead time applies to an educated person as well as to a piece of military hardware, and Rickover clearly sees both of these as joint products of a good educational system. Above all, however, the ability to win a fighting war depends basically upon the lead times in the introduction of new military hardware. Rickover furnishes some illustrations of military inventions which could have won World Wars I or II for either side, if they had been available in finished form at certain critical times when the enemy had no conceivable defenses against them. The point, however, is that they weren't ready at these critical junctures, and they weren't ready because their corresponding lead times were too long. Even more important still is that the lead time of Russian technology, chiefly and often industrial, is considerably lower than our own. If this continues we will either be forced into pacing Russia in military invention or we shall be expected to develop counter military inventions when we learn of new, Russian military developments, without having the time to do so. Both these possibilities would not augur well for U S. preparedness.

Higher U. S. lead times are due to several factors. Delays are inevitable under the administrative procedures of democracy — delays which do not exist for a monolithic, totalitarian state like Russia. Other delays are not inevitable, such as that due to the poorer *overall* training of our scientists and engineers at the bachelor's level, as well as the smaller number of them graduated from our academic institutions, irrespective of quality of training. An analysis of the causes of this poorer training, however, is the *raison d' etre* of Rickover's volume. Where it exists it is a product of several factors: (1) a traditional egalitarian philosophy in education and social life, (2) the emergence of what Nathan Leites and Martha Wolfenstein have called "fun morality," and (3) the appearance of what Whyte has designated as The Social Ethic whose first institutional impact is felt in U. S. elementary and secondary school systems. Part of Rickover's volume is devoted to meeting the charge of educationists that a trying curriculum and selection for homogeneous grouping would constitute class-biased phenomena. Another part of the volume is devoted to attacking "fun morality" on the grounds that education which caters to it, as does the life-adjustment philosophy of education, neglects education's traditional role of guiding the mind and the spirit. Rickover presents extensive evidence of the extent to which European school systems, both non-Russian and Russian, have been successful in realizing these traditional, educational ideals, with students of *average calibre*. Thus the argument of progressive educators that European education is for the classes, not the masses, is seen by Rickover as the fantastic rationalization of a vested Deweyan educational philosophy. Rickover opposes a fun morality on two basic grounds. It alienates man from his cultural heritage and deprives him of his birthright to develop his potentialities to the fullest. It also frequently flattens any motivation to seek scientific and engineering training, where the student is well qualified. This is particularly disastrous for the age which lies ahead in which technical know-how, scientific thoughtways in human relations, and "egg-head" creativity will be in greater demand than ever before. In addition, a fun morality which stresses superfluous creature comforts, accentuates the rate of depletion of our rapidly dwindling, natural resources, with its emphasis on fickleness towards current models of old gadgets and fashionable urges towards the latest gadgets. This results in making basic materials less avail-

able for defense and new military hardware, thus making us dependent upon resources under the control of other nations, with all the political risks which such situations involve. The Social Ethic is criticized by Rickover on the grounds that it stifles originality in much needed basic research and puts a premium upon extraversion. This results in an unhappy treatment of, and below par creativity by, our top-flight scientific personalities, a very substantial number of whom are introverts in the original sense in which this term was used by Jung.

Rickover's suggestions for changing over from a "soft education" to a "hard education" are admirable. Unfortunately they neglect the sociological fact that the educational problem is part of a larger, social philosophy whose values permeate institutional life in general. This would make it difficult to revamp an educational system which is designed to reflect these values. If most Americans possess values which result in the acceptance of superficiality in the intellectual and spiritual life, it is not because their education is superficial. The true relationship is probably the reverse of this. Rickover's sociological oversights are apparent in his appeal to American women to enter the good fight for educational change. Evidence indicates that most mothers support life-adjustment education, that most non-college teachers are women who adopt the life-adjustment program enthusiastically, and that middlebrow fondness for the genteel tradition, gracious living and the role-playing which will be rewarded by popularity and social acceptability, may only reflect an important fact overlooked by Rickover. That fact is that the lady whom Vance Packard's merchandisers call Mrs. Middle Majority and who controls the American consumption pattern, for both tangibles and intangibles, may have been sold the values mentioned via her suggestibility to Metro-Goldwyn-Mayer stereotypes of refinement and culture, of popular personal traits and of desirable vocations, with help from various other mass media, of course. If the life-adjustment philosophy and program seem to furnish these, she will staunchly support them. As a consequence Rickover's opposition may lie largely in the direction from which he expects support.

Rickover's book is informed, thoughtful and serious, and his facts are well marshalled. His diagnosis and cure of the difficulties are unfortunately oversimplified. The etiology of these difficulties is complex. We shall have to look to the sociologist to unravel them more carefully and propose some solutions which can be accepted on a nation-wide basis.

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